95-953

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

– vs. –

CITY OF NEW YORK, RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY, and PARAGON CABLE MANHATTAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the order of a state administrative agency constituting a prior restraint on First Amendment speech is ripe for judicial review.

PARTIES TO THE PROCEEDING

The petitioner to this proceeding is Liberty Cable Company, Inc., which was a plaintiff-appellant in the courts below.

The named respondents in this proceeding are the City of New York, Ralph A. Balzano, the New York State Commission on Cable Television, William B. Finneran, Gerard D. DiMarco, Barbara T. Rochman, David F. Wilbur and John Passidomo -- who were defendants-appellees in the courts below -- and the United States of America, Time Warner Cable of New York City and Paragon Cable Manhattan, who were intervenors-defendants-appellees in the courts below.

Respondents unnamed in the caption are Sixty Sutton Corp. and Jack A. Veerman, both of whom were plaintiffs-appellants in the courts below.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement	2
Reasons for Granting the Petition	11
Conclusion	25

TABLE OF AUTHORITIES

Cases:	Page
Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)	*passim*
Alexander v. U.S., ___ U.S. ___, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993)	12
American Arab Anti-Discrimination Committee v. Reno, ___ F.3d ___, 1995 WL 654094 (9th Cir. 1995)	16
Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)	15, 22
Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)	13
Beach Communications, Inc. v. FCC, 959 F.2d 975 (D.C. Cir. 1992), *appeal after remand*, 965 F.2d 1103 (D.C. Cir. 1992), *rev'd.*, ___ U.S. ___, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)	8, 23
CBS, Inc. v. Davis, ___ U.S. ___, 114 S.Ct. 912, 127 L.Ed.2d 358 (1994)	13
Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995)	16
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986)	14, 23
Columbia Broadcasting System v. United States, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942)	17
EPA v. National Crushed Stone Assn., 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980)	19
Florida Power & Light Co. v. Lorion, 470 U.S. 729, 105 S.Ct. 1598, 84 L.Ed. 2d 643 (1985)	21

Cases: **Page**

Freedman v. State of Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)..... 13, 14, 15

Frozen Food Express v. United States, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956)..... 18

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)..... 14, 15

Gardner v. Toilet Goods Assn., 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967)..... 19, 22

Leathers v. Medlock, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991)..... 13, 14

Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)..... 19, 20, 22

Martin Tractor Co. v. Federal Election Commission, 627 F.2d 375 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 954, 101 S.Ct. 360, 66 L.Ed.2d 218 (1980)..... 15

Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)..... 10, 17

National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977)..... 15

Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)..... 13

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995)..... 15, 16

New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)..... 13

Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971)..... 13

Cases: **Page**

Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n., 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)..... 19

Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327 (9th Cir. 1994), *cert. denied*, __U.S.__, 114 S.Ct. 2738, 129 L.Ed.2d 859 (1994)..... 23

Reno v. Catholic Social Services, Inc., ___ U.S. ___, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993)..... 19, 22

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)..... 15

South Fork Broadcasting Corp. v. FCC, 59 F.3d 1249 (D.C. Cir. 1995)..... 16, 17

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)..... 13

Thunder Basin Coal Co. v. Reich, ___ U.S. ___, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994)..... 19

Toilet Goods Assn. v. Gardner, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967)..... 19, 22

Turner Broadcasting System, Inc. v. FCC, ___ U.S. ___, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)..... 13, 14

United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947)..... 18

United States v. Los Angeles & S.L.R. Co., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651 (1927)..... 18

Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980)..... 13, 14

Cases:	Page
West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)	17
United States Constitution:	
First Amendment	*passim*
Fifth Amendment	6, 7
Fourteenth Amendment	6, 7
Statutes and Other Authorities:	
Cable Communications Policy Act of 1984, Public Law 98-549, 98 Stat. 2780, October 30, 1984	
47 U.S.C. § 521	4
47 U.S.C. § 522	2, 3, 4, 5
47 U.S.C. § 532	9
47 U.S.C. § 535	9
47 U.S.C. § 541	2, 3, 4, 7
47 U.S.C. § 544	9, 10
N.Y. Exec. Law § 811 (McKinney 1982)	3
N.Y. Exec. Law § 812 (McKinney 1982)	2
N.Y. Exec. Law § 814 (McKinney 1982)	2, 3
N.Y. Exec. Law § 815 (McKinney 1982)	2, 3
N.Y. Exec. Law Article 28 (McKinney 1982)	4, 9
N.Y. Comp. Codes R. & Regs. tit. IX, § 596.10 (1995)	9
1995 New York Laws, Ch. 85	3
New York City Council Resolution 1639	5, 9

	Page
Davis, K. and Pierce, R., *Administrative Law Treatise,* (3d Ed. 1994)	18, 19
M. Nimmer, *Nimmer on Freedom of Speech* (1984)	12

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Liberty Cable Company, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App., *infra*, A-1-7) is reported at 60 F.3d 961.

The opinion of the United States District Court for the Southern District of New York (App., *infra*, A-23-74) is reported at 893 F. Supp. 191.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1995. App., *infra*, A-21-22. A petition for rehearing with suggestion for rehearing *en banc* was denied on September 18, 1995. App., *infra*, A-20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent sections of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 522(5), (6) and (7) and 541, are reprinted at App., *infra*, A-173-77. The relevant portions of New York Executive Law, §§ 812, 814 and 815, are reprinted at App., *infra*, A-173-183.

STATEMENT

This case arises out of an administrative injunction issued by respondent New York State Commission on Cable Television ("NYSCC") prohibiting Liberty Cable Company, Inc. ("Liberty"), from engaging in First Amendment speech and press activity. App., *infra*, A-150-53.[1] Despite the immediate and tangible nature of this prior restraint of Liberty's First Amendment rights, the courts below refused to adjudicate Liberty's challenge to the state injunction, dismissing it as unripe. As a result, the Courts below did not reach Liberty's First Amendment challenge to provisions of the Cable Act requiring the State to franchise and otherwise to regulate video programming distribution systems that do not use public property. The issue in this case has a profound effect on the exercise of core constitutional values; the lower courts' holdings, moreover, conflict with: (1) courts of appeals

[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioner Liberty Cable Company, Inc. states that it has no parent or subsidiary companies (other than those that are wholly owned).

decisions and decisions of this Court regarding the ripeness of prior restraints; and (2) courts of appeals decisions and decisions of this Court regarding the ripeness of any administrative enforcement order.

Liberty is an alternative multichannel video programming distributor[2] that serves approximately 25,000 subscribers in the New York City metropolitan area. App., *infra*, A-99-100. Unlike its franchised cable television competitor, respondent Time Warner Cable of New York City ("Time Warner"), Liberty does not utilize public property to distribute video programming. *Id.* at A-103. Rather, it receives satellite and broadcast television signals at several reception facilities and retransmits the signals by microwave to reception antennae located on the roofs of multiple unit dwellings in which residents receive Liberty's video programming service. *Id.* at A-103.

In a limited number of instances, Liberty serves more than one building not under common ownership, operation or management from a single microwave reception antenna by using coaxial cable to link the building that houses the reception antenna to an adjacent building ("Non-Common Systems"). App., *infra*, A-104. The question at the heart of Liberty's challenge is the constitutionality of requiring these Non-Common Systems, which operate entirely on private property, to obtain a franchise before exercising First Amendment rights. The question at the heart of this petition is whether an administrative order enforcing this requirement is ripe for judicial review.

1. *Statutory Background.* On December 9, 1994, NYSCC[3] orally issued an administrative injunction (the

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[2] The term "multichannel video programming distributor" is defined at 47 U.S.C. § 522 (12).

[3] NYSCC was established by N.Y. State Exec. Law § 814. It is vested with the authority, *inter alia*, to regulate cable companies providing service in New York. N.Y. Exec. Law § 811. NYSCC has the specific authority to regulate the municipal franchising process. N.Y. Exec. Law § 815(2)(a). As of January 1, 1996, NYSCC will cease to exist and its powers will be transferred to the New York State Public Service Commission. 1995 New York Laws, Ch. 85.

"Standstill Order" or "administrative injunction") that barred Liberty from providing video programming service to subscribers in new Non-Common Systems unless Liberty first obtained a cable television franchise from respondent City of New York ("City"). The Standstill Order states:

> There will be an immediate standstill; again, requiring no additional cable or closed transmission interconnections of buildings not commonly owned, controlled or managed; that where service is not currently being provided, that no new subscribers be serviced through such hard-wired interconnection absent common ownership, control or management; that such standstill be in effect until vacated by this commission.

App., *infra*, A-150-51. NYSCC issued the Standstill Order pursuant to provisions of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521, *et seq.*, and Article 28 of the New York State Executive Law. Specifically, NYSCC relied upon 47 U.S.C. § 541(b), which provides that "a cable operator may not provide cable service without a franchise," and § 522(7), which defines a "cable system" as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right of way.

(the "Common Ownership Requirement").[4] Despite the fact that they do not use any public property, Liberty's

[4] The term "cable operator" is defined, in pertinent part, as "any person or group of persons (A) who provides cable service over a cable system . . . 47 U.S.C. § 522(5). The term "cable service" means "(A) the one-way

(Footnote continued)

Non-Common Systems are "cable systems" as defined by the Cable Act and are subject to the franchise requirements of the Cable Act. App., *infra,* A-105.

2. *The Absence of a Franchise.* The Common Ownership Requirement was enacted in 1984. A decade later, the City did not have any procedure available to franchise "cable systems" that did not use public property, and there was no indication when or whether such a franchise procedure would be created. App., *infra*, A-107-09. Nevertheless, NYSCC enjoined Liberty from serving new Non-Common Systems until Liberty obtained the unavailable franchise. Thus, as soon as it was issued, the NYSCC injunction restrained Liberty from engaging in protected speech and press activity for an indeterminate period of time.[5]

The administrative injunction is designed to remain in place indefinitely. Its termination is triggered by the occurrence of one of two events: (1) a determination by NYSCC to vacate it; or (2) Liberty's acquisition of a City franchise. The first event will occur only at the whim of NYSCC. The second event -- Liberty's acquisition of a City franchise -- rests entirely in the discretion of New York City. This authority, which is defined in the New York City Charter and City Council Resolution 1639, is not subject to temporal or substantive limitations.[6] App. *infra,* A-139-46; A-184-87.

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transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." 47 U.S.C. § 522 (6).

[5] Despite the uncertainty of whether and when a franchise would be available from the City, NYSCC did not specify any date certain upon which the administrative injunction would terminate. Rather, it stated that "such standstill [will] be in effect until vacated by this commission." App. *infra,* A-151.

[6] On February 24, 1995, more than five months after the issuance of the Standstill Order and a mere five days before the district court hearing on

(Footnote continued)

On November 13, 1995, the City finally issued a Request for Proposal ("RFP") for a cable television franchise for entities not using public property.[7] The RFP necessarily incorporates the terms of Resolution 1639 and requires applicants to submit their proposals and all materials responsive to the RFP by January 31, 1996 (RFP at 3). The City then has until March 1, 1996 to identify the applicants, if any, with whom it will negotiate. *Id.* The City is not obligated to enter into negotiations with any applicant, even if the applicant provides a proposal that meets all of the terms set forth in the RFP. *Id.* at 6. In addition, the City can "postpone or cancel this RFP or [ ] reject any or all proposals at any time." *Id.* at 7.

Even if the New York City Department of Information Technology and Telecommunications ("DOITT"), the City agency responsible for administering the franchise process, ultimately offers Liberty a franchise agreement, that agreement is still subject to the standardless approval of (a) the Franchise and Concession Review Committee -- a City agency; (b) the Mayor of New York City; and (c) NYSCC or its successor. *Id.*

None of these city and state entities are governed by any objective substantive standards upon which they must base their decision. The Committee, the Mayor and NYSCC are not required by any statute or regulation to approve franchise applications that meet all criteria of law and all the terms of the RFP.

3. *Proceedings in District Court.* On December 13, 1994, Liberty filed a First Amended Complaint seeking a declaration and enforcement of its First Amendment rights and its right to due process under the Fifth and Fourteenth

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Liberty's petition for an injunction, the City initiated by Notice a rulemaking proceeding to establish a rule for the issuance of "Off Street Cable Franchises." App., *infra,* A-33. It took the City until November 13, 1995, almost nine months from that date of the Notice, to issue a Request For Proposal, the next step in the franchising process.

[7] A copy of the RFP has been lodged with the Court.

Amendments of the United States Constitution. App., *infra*, A-101; A-112-116. Specifically, Liberty challenged the Common Ownership Requirement facially and as applied to Liberty's Non-Common Systems. The Complaint also alleged that:

> The operation of the Non-Common Systems . . . is a speech activity on private property protected by the First Amendment . . . . Defendants' conduct which, *inter alia*, includes the prohibition of Liberty's operation of the Non-Common Systems without a franchise, and the failure to provide the terms and conditions for the issuance of a franchise to cable systems which do not use public property or rights-of-way, prevents, burdens, violates and interferes with Liberty's rights to engage in protected speech activity on private property in violation of the First Amendment.

App., *infra*, A-113-114. Liberty also claimed that the procedures used by NYSCC and DOITT deprived it of due process pursuant to the Fifth Amendment of the Constitution and was unreasonable pursuant to 47 U.S.C. § 541(a)(1). App., *infra*, A-174.

On December 21, 1994, Liberty, Sixty Sutton Corp. and Jack A. Veerman moved before the United States District Court for the Southern District of New York (Preska, J.) for a preliminary injunction lifting this prior restraint of speech. Respondents NYSCC and Time Warner[8] opposed Liberty's motion and cross-moved to dismiss the complaint on the grounds that, *inter alia*, Liberty's First Amendment claims were not ripe for adjudication. In a March 13, 1995 opinion,[9] the district court granted the motions to dismiss Liberty's

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[8] On February 14, 1995, the district court permitted Time Warner to intervene as a defendant over the objections of Liberty. App., *infra* A-38.

[9] The March 13, 1995 opinion is embodied in an Order entered on March 14, 1995. App., *infra*, A-87.

First Amendment and due process claims on ripeness grounds. App., *infra*, A-29-30. The district court denied the motions to dismiss Liberty's claim that the Common Ownership Requirement violates equal protection; however, the court also denied Liberty's motion for a preliminary injunction as to that claim. *Id.*

In its dismissal of Liberty's First Amendment claims, the district court relied heavily upon the decision of the Court of Appeals for the District of Columbia in *Beach Communications, Inc. v. FCC*, 959 F.2d 975 (D.C. Cir. 1992) ("*Beach I*"), *appeal after remand*, 965 F.2d 1103 (D.C. Cir. 1992) ("*Beach II*"), *rev'd.*, __ U.S. __, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("*Beach III*").[10] App., *infra*, A-43-45. The district court rejected the fundamental distinction between this case, where a state agency actually applied the Cable Act to enjoin Liberty from exercising its First Amendment rights, and *Beach*, where the petitioners asserted a purely facial challenge to the federal statute. Applying the first prong of the test in *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681(1967) ("*Abbott*"), the court reasoned that the issues were not fit for adjudication because (a) Liberty had "not yet applied for a franchise" from the City, App., *infra*, A-44-45; (b) neither NYSCC nor the City had "taken any final action with respect to Liberty," *id.*; (c) Liberty could not "identify what burdens the franchising scheme might impose," *id.*; and (d) without knowing "the precise nature of the burdens imposed, it cannot be said what the appropriate level

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[10] In *Beach I*, the D.C. Circuit dismissed a petition to review the FCC's definitional order interpreting the Common Ownership Requirement on the grounds that, in the absence of any attempt to enforce the franchise requirement on the petitioners, the First Amendment issues raised were not ripe. 959 F.2d at 985. The parties did not request *certiorari* on the issue of the ripeness of the First Amendment claims. However, the Circuit Court ultimately found the statute unconstitutional on equal protection grounds. 965 F.2d at 1106. In reversing the appellate court's equal protection ruling, this Court never opined on the issue of ripeness. *Beach III*, __ U.S. at _____, 113 S.Ct. at 2100, n.3.

of scrutiny might be with which to evaluate plaintiffs' First Amendment challenge." App., *infra*, A-46-47.

Applying the second *Abbott* prong, the district court found that, "it cannot be said on the facts currently in the record that any particular hardship will befall the plaintiffs if judicial decision-making is withheld for now." App., *infra*, A-48. The court did not address the fact that the NYSCC injunction was barring Liberty from engaging in First Amendment expression -- a hardship that the *Beach* petitioners did not face -- although it did make the inapposite statement that Liberty did not risk imminent "serious penalties" because "whether the defendants will exercise their regulatory authority in such a way as to impinge upon the constitutional rights of plaintiffs simply cannot be ascertained as of yet." *Id.*[11] Conversely, the court found that an adjudication of the constitutionality of the Common Ownership Requirement might harm the City and NYSCC by interfering with their proceedings to enforce that provision.[12] App., *infra*, A-53.

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[11] The City Charter, City Council Resolution 1639, Article 28 of the New York Exec. Law and the relevant provisions of the Cable Act defined the set of minimum burdens that would be imposed on any cable franchisee. Liberty demonstrated that the burdens would include (1) the loss of at least 8 channels of its unique programming in order to fulfill the combined federal, state and city programming requirements, *see* 47 U.S.C. §§ 532 and 535, N.Y. Comp. Codes R. & Regs. tit. IX, § 596.10, App., *infra*, A-139-46; A-159; (2) the expenditure of at least $191,000,000 to meet franchise construction costs to provide "universal service" within the four New York City community board districts (the smallest permissible franchise areas) in which Liberty currently operates, App., *infra*, A-163 and (3) the expenditure of at least $625,000 to provide subscribers with self-censoring lock-out devices pursuant to 47 U.S.C. § 544(d)(2). App., *infra*, A-164.

[12] The district court acknowledged that Liberty may have suffered harm when it stated that any harm suffered by Liberty would be of its "own making" because Liberty did not apply for the *non-existent* franchise from the City immediately after the Supreme Court's decision in *Beach* upholding the Common Ownership Requirement under a rational basis-equal protection analysis. App., *infra*, A-49.

2. *Proceedings in the Second Circuit.* The Court of Appeals for the Second Circuit adopted the lower court's opinion. App., *infra,* A-1-7. The Court of Appeals agreed entirely with the district court's ripeness analysis and adopted its reasoning. The Second Circuit's opinion added "a few additional words of clarification" to the district court's due process analysis. App. *infra,* A-5. The Court of Appeals stated that, "[i]n ruling that Liberty's due process claims were not yet ripe for adjudication, the district court stated that 'a procedure is in place through which Liberty can obtain a franchise,'" but the Circuit Court then proceeded to explain that:

> Though this statement is not literally correct, since New York City does not yet have a final procedure for the granting of so-called "off-street" franchises, we understand the District Court to have been referring to the fact that the City is presently creating an off-street franchise procedure through a rulemaking proceeding.

Id. The Court of Appeals went on to find that Liberty's due process rights would be vindicated so long as the City acted with "reasonable dispatch" in issuing off-street franchise procedures and negotiating a franchise with Liberty. App., *infra,* A-6. As authority, the Second Circuit cited *Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and its progeny.

Liberty petitioned for rehearing with suggestion for rehearing *en banc,* arguing, *inter alia*, that the Court of Appeals had erred in applying *Matthews v. Eldridge* in a First Amendment context. Liberty's petition was denied on September 18, 1995. App., *infra*, A-20.

3. *The Standstill Order Remains in Effect.* The administrative injunction, in effect for more than one year, still prevents Liberty from serving subscribers in new Non-Common Systems. The district court continues to maintain that, until the City franchise process has been completed, the litigation will not be ripe. In other words, the keys to the courthouse door are held by the City. Only when it concludes its

franchise proceedings will any of Liberty's First Amendment claims be reviewed by the district court. Thus, Liberty's challenge to the Standstill Order as a prior restraint, its challenge to the standardless City franchise procedures and its challenge to NYSCC's ruling that it must seek a franchise, remain indefinitely postponed until Liberty is denied the franchise it does not believe it must legally seek.

REASONS FOR GRANTING THE PETITION

The lower-court decisions are a dangerous anomaly in First Amendment jurisprudence. Neither precedent nor principle supports the proposition that a state injunction restraining speech does not present an Article III case or controversy. There is certainly no precedent or principle that a prior restraint of speech, as has existed here since December 1994, is not ripe for review until a local franchising authority has developed its franchise criteria and has denied a franchise.

If the decisions below are not reversed, Second Circuit courts will remain closed to First Amendment speakers whose rights unquestionably have been trampled but where the damage inflicted has not yet been determined. This is a *Through-The-Looking-Glass* perversion of First Amendment jurisprudence, which consistently has advanced the principle that the appropriate time for a federal court to intervene to review a state-issued prior restraint of speech is *no later* than the moment that the state action impairs speech. Any other rule would condone the indefinite delays in federal judicial consideration of state burdens on speech that Liberty has experienced here. This result should not be countenanced.

The courts below badly confused the law of ripeness. Unless clarified, these decisions will import into judicial review of enforced administrative orders notions of ripeness that heretofore have been limited to pre-enforcement review. The decisions below are an unprecedented departure from the presumption that every agency enforcement action is reviewable. They create the spectre of virtually unbridled administrative enforcement power untempered by the immediate availability of judicial review.

NYSCC issued its order in reliance upon provisions of the Cable Act that Liberty maintains violate the First Amendment by regulating speech that occurs exclusively on private property. The constitutionality of the statutory provisions challenged by Liberty is an issue vital to the development of the communications industry. The resolution of this challenge will directly affect the growth of competition in an industry that both Congress and the Federal Communications Commission ("FCC") have determined is already highly concentrated and prone to monopolization. Resolution of this challenge will also affect the programming choices available to consumers. App., *infra*, A-159-62. This Court recognized the importance of the question of whether Non-Common Systems not using public rights of way can be regulated under the Constitution by granting *certiorari* in *Beach*.

If cable companies or other First Amendment actors are subject to prior restraints of speech, the statutory underpinnings of these restraints must be reviewable immediately. Liberty seeks reversal of the lower courts' dismissal of its First Amendment claims on ripeness grounds so that Liberty's challenge to the administrative injunction and, consequently, to the statutes that the injunction enforces, can be adjudicated.

1. *Judicial Review Must Be Immediately Available to Challenge a Prior Restraint.* If permitted to stand, Second Circuit law will render state administrative injunctions that constitute prior restraints on the exercise of First Amendment rights immune from immediate judicial review.[13] By denying Liberty the opportunity to be heard on the merits of its First Amendment challenge, the Second Circuit has slammed the door on speakers alleging that a prior restraint burdens a core

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[13] The administrative injunction is a prior restraint of speech. The term "prior restraint" describes "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. U.S.*, ___ U.S. ____, 113 S.Ct. 2766, 2771, 125 L.Ed.2d 441 (1993), *quoting* M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, at 4-14 (1984) (emphasis added).

constitutional right. This precedent is even more remarkable because there is no case where a First Amendment prior restraint has been found unripe. Prior restraints "come[ ] to this Court bearing a heavy presumption against [their] constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963), and they can be upheld only rarely and then *only* because of the immediacy of judicial review.[14]

The threshold issue necessary to satisfy any court that a prior restraint of speech can survive judicial scrutiny has been the availability of immediate judicial review.[15] "[A]ny restraint

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[14] The articulated preference for judicial review only after any alleged illegal First Amendment activity, as opposed to restraint beforehand, has led this Court and the Circuit Courts of Appeals routinely to strike down prior restraints as violative of the First Amendment. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed 1357 (1931); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). As Justice Blackmun said in *CBS, Inc. v. Davis*, _____ U.S. _____, 114 S.Ct. 912, 914, 127 L.Ed.2d 358 (1994), only in the most exceptional circumstances, where "the evil that would result . . . is both great and certain and cannot be militated by less intrusive measures" have prior restraints been upheld.

The duration of the administrative injunction depends entirely on the exercise of standardless administrative discretion by state and municipal agencies. *See* discussion at 5-6, *supra*. As such, the administrative injunction is paradigmatic of the type of licensing requirement that has been held to be an impermissible prior restraint of First Amendment activity. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 1576, 29 L.Ed.2d 1 (1971) (an order "enjoining petitioners from distributing leaflets anywhere in the town of. . . ." was an impermissible prior restraint); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413 (1980) (an order "restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed" amounted to an unconstitutional prior restraint).

[15] "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FCC*, __ U.S. __, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994); *see also Leathers*

(Footnote continued)

imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo *for the shortest fixed period compatible with sound judicial resolution.*" *Freedman v. State of Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965) (emphasis added). Absent the safeguards created by prompt judicial review, no prior restraint has, heretofore, been able to survive judicial scrutiny.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229, 110 S.Ct. 596, 603-06, 107 L.Ed.2d 603 (1990), this Court evaluated a statute that vested in a municipality the authority to grant or deny licenses necessary to the operation of adult-oriented businesses. The Court found that:

> the Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity . . . .

Id. at 606. Liberty's position is analogous to that of *FW/PBS*. NYSCC exercised its substantively and temporally boundless discretion to restrain speech. Yet, the Second Circuit created a new rule of law finding Liberty's challenge not even

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v. Medlock, 499 U.S. 439, 444, 111 S.Ct. 1438, 1442, 113 L.Ed.2d 494 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986). Consequently, any government regulation that burdens the speech activity of a video programming distributor, such as Liberty, is subject to a heightened level of judicial scrutiny, particularly where, as here, the regulation imposes a prior restraint on the speaker. *See, e.g., Turner*, __ U.S. at __, 114 S.Ct. at 2460-61 (finding that an intermediate level of scrutiny applied to the must-carry provisions of the Cable Act).

justiciable -- directly contrary to the holding in *FW/PBS*. *See also National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (holding that "[i]f a State seeks to impose a restraint [on the First Amendment], it must provide strict procedural safeguards, including immediate appellate review. . ."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155, 89 S.Ct. 935, 941, n.4, 22 L.Ed.2d 162 (1969) (same).

The notion that a state agency's injunction against First Amendment activity -- an action even more debilitating to First Amendment rights than the failure to grant a license -- would be deemed unreviewable on ripeness grounds cannot be reconciled with *Freedman*, *FW/PBS* and *National Socialist Party of America*. Yet, the prevailing rule in the Second Circuit now holds that an administrative injunction on First Amendment activity burdening a specific actor and preventing that actor from airing specific First Amendment speech, is not ripe for review unless a subsequent condition -- completion of the licensing process -- is met.

2. *The Second Circuit's Decision Creates A Conflict Among The Circuits.* It is not surprising that the Second Circuit's new position on ripeness also conflicts directly with the standards articulated in other Circuits. A recent opinion dramatizes the magnitude of the Second Circuit's departure from the norm. In *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995), the Tenth Circuit began its analysis by stressing that, in the First Amendment context, the ordinary ripeness rules were relaxed to insure that unnecessary burdens did not chill First Amendment rights. The Circuit Court noted that, in the First Amendment context, the reasonable predictability of an enforcement action or threats of enforcement, without more, were sufficient to create ripeness. *Id.* at 1499, *citing Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298-99, 99 S.Ct. 2301, 2308-09, 60 L.Ed.2d 895 (1979); *Martin Tractor Co. v. Federal Election Commission*, 627 F.2d 375, 380 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 954, 101 S.Ct. 360, 66 L.Ed.2d 218 (1980). In fact, in *Richardson*, *supra*, the Tenth Circuit found ripe a

facial challenge to New Mexico's election laws where there was no enforcement action and no indication that any governmental entity intended to take action against Richardson.

The concern that forbidding challenges to statutes and administrative actions that burden First Amendment rights would itself chill speech pervades the cases adjudicating the ripeness of First Amendment litigation. The standard defined by the courts below becomes more perverse when viewed in the context of the deference by courts -- in the form of more relaxed ripeness standards -- that is usually paid to actions alleging a burden on the First Amendment. *See, e.g., American Arab Anti-Discrimination Committee v. Reno*, ___ F. 3d. ___, 1995 WL 654094 at 10 (9th Cir. 1995). ("As noted earlier, injury to First Amendment rights more readily justifies a finding of ripeness due to the chilling effect on protected expression which delay might produce"); *Cheffer v. Reno*, 55 F.3d 1517, 1523, n.12 (11th Cir. 1995) (noting that "ripeness is more loosely applied in a First Amendment context"). If this Court permits the lower-court opinions to stand, a conflict will have emerged among the circuits.

3. *Challenges to Procedures Restraining First Amendment Rights Must Be Adjudicated Promptly.* One particularly dangerous consequence of the Second Circuit's rule is that it postpones review of allegedly unconstitutional administrative procedures restraining First Amendment rights. Liberty argued below that it should not be barred from serving new Non-Common Systems while the City promulgates franchise procedures and negotiates a franchise with Liberty -- a franchise that Liberty argues is unconstitutional. The prior restraint of Liberty's speech has been in place for over a year, with no end in sight.

The Second Circuit held that, as long as the City acts with "reasonable dispatch," judicial review is not available. The District of Columbia Circuit contemporaneously took a position contrary to the Second Circuit's position in this case. In *South Fork Broadcasting Corp. v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), the FCC argued that a monetary forfeiture against

a broadcaster of indecent material was not ripe for review because further administrative proceedings were available and because the broadcaster would have the opportunity to challenge the procedures when the government attempted to collect the forfeiture. The Court of Appeals gave short shrift to the FCC's argument, pointing to the obvious flaw: "the broadcaster would have to wait until judicial review is at hand before it could argue that judicial review does not come soon enough." *Id.* at 1258. The Court of Appeals concluded correctly that the "possibility that the agency's actions might . . . run afoul of the first amendment demands prompt judicial scrutiny." *Id.* at 1259, *citing, Columbia Broadcasting System v. United States*, 316 U.S. 407, 425, 62 S.Ct. 1194, 1204, 86 L.Ed. 1563 (1942). The Second Circuit's decision withholds judicial review until after the challenged administrative procedures are completed. The decision eliminates any hope of prompt review.

The need for prompt judicial scrutiny of administrative proceedings restraining First Amendment rights should be inarguable. Government cannot be permitted to infringe free speech, yet have control over the timing of any challenge to that infringement. Yet this is precisely what the Second Circuit did when it denied Liberty judicial review, justifying its postponement of review by relying on the *Matthews v. Eldridge* line of cases. It is error to apply the low level, rational basis test of *Eldridge* in a First Amendment context. The *Eldridge* test governs the due process applicable to statutory entitlements. It does not apply to fundamental constitutional rights. When a due process challenge to a government act curtailing free speech is raised, a high level of scrutiny is called for. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628 (1943).

The Court should take this opportunity to determine whether heightened or strict scrutiny applies in this context. Otherwise, other circuit courts may adopt the Second Circuit's error that "reasonable" administrative delay can bar

review of an administrative order burdening free speech. This should not be the law.

4. *The Courts Below Misapplied the Ripeness Test of Abbott.* Second Circuit law now interprets this Court's decision in *Abbott* in a way that defeats the very purpose of that opinion. *Abbott* was intended to expand the circumstances under which courts could review a rule before enforcement. It was never intended to apply to or to restrict judicial review after the government actually had enforced an order. There is no reported case (save the lower-court opinions in this case) that has held that an administrative injunction actually enforced is unreviewable on ripeness grounds. This Court should clarify its decision in *Abbott* to make clear that an enforced order, such as that presented here, is ripe for review.

In affirming the district court, the Second Circuit lost sight of the intended purpose of *Abbott*. The opinion in *Abbott* created criteria to determine when a rule could be reviewed before enforcement. Prior to *Abbott,* the Court generally had rejected pre-enforcement review or permitted it only in narrow circumstances. *See, e.g., Frozen Food Express v. United States*, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956); *United Public Workers v. Mitchell,* 330 U.S. 75, 89-92, 67 S.Ct. 556, 564-65, 91 L.Ed. 754 (1947); *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299, 309-10, 47 S.Ct. 413, 414, 71 L.Ed. 651 (1927). With the 1967 *Abbott* decision, the Court both regularized the approach to reviewing pre-enforcement claims, and significantly broadened the circumstances under which pre-enforcement review was possible. In discussing *Abbott*, Professor Davis observed that:

> The Court transformed the law of ripeness dramatically in 1967 . . . . Prior to 1967, the court was reluctant to consider the validity of any statute, rule or informal statement of an agency's position *except in the context of a party's attempt to defend its conduct in an enforcement proceeding.*

Davis, K. and Pierce, R., *Administrative Law Treatise*, Sec. 15.12 at 361 (3d Ed. 1994). (emphasis added).

Abbott used the model of the enforcement proceeding to establish criteria to determine the limited circumstances in which pre-enforcement review could be ripe. It distilled the characteristics of enforced orders that necessarily made them ripe for review and applied those characteristics to review of rules yet to be enforced. The concerns enumerated in this Court's oft-quoted explanation of the test it articulated for pre-enforcement review are not present after enforcement occurs. The test prevents the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference *until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Id.* at 148, 87 S.Ct. at 1515 (emphasis added).

While the critical characteristics of finality, hardship and the presence of concrete disagreements are inherent in enforcement proceedings, they are not necessarily present prior to enforcement. Accordingly, the test in *Abbott* is appropriately applied pre-enforcement. *See Reno v. Catholic Social Services, Inc.*, ___ U. S. ___, 113 S.Ct. 2485, 125 L. Ed. 2d 38 (1993); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed. 2d 695 (1990); *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n.*, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 101 S. Ct. 295, 66 L.Ed. 2d 268 (1980); *Gardner v. Toilet Goods Assn.*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967); *Toilet Goods Association v. Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *see also Thunder Basin Coal Co. v. Reich*, ___ U. S. ___, 114 S. Ct. 771, 778, 127 L. Ed. 2d 29 (1994); Davis, *Administrative Law Treatise*, § 15.11 at 159 ("Since 1967, the Supreme Court and the circuit courts have applied the two-part *Abbott* test in hundreds of cases involving this ripeness rule for judicial review *prior to the application of the rules"*) (emphasis added).

When pre-enforcement review of a rule is sought, there is usually an issue as to whether the claim is premature and

whether hardship is present. However, once a rule is enforced, there is absolutely no risk of premature judicial determination; the factual and legal determinations made by the enforcing agency become the foundation for any subsequent judicial decision making. There is no risk of the courts' "entangling themselves in abstract disagreement," *Abbott,* 387 U.S. at 148, 87 S. Ct. at 1515; the disagreements are formed and defined. Nor is there any need to "protect the agencies from judicial interferences until an administrative decision has been formalized," *Abbott,* 387, U.S. at 148, 87 S. Ct. at 1515; the order enforcing the rule is the formal act of the agency. As succinctly stated by the Court in *National Wildlife Federation*, where "a substantive rule . . . as a practical matter requires the plaintiff to adjust his conduct immediately . . . [s]uch agency action is 'ripe' for judicial review at *once* . . ." *National Wildlife Federation*, 110 S.Ct. at 3190 (emphasis added).

In this case, Liberty does not seek pre-enforcement review. Rather, it seeks judicial review following the enforcement of the Common Ownership Requirement by NYSCC. The stated purpose and the actual effect of the Standstill Order is to force Liberty to adjust its conduct as of the date of its issuance. Accordingly, the order was reviewable at *once.*

The danger in applying *Abbott* beyond pre-enforcement review to review of an enforced order is demonstrated in this case. The two-prong test for ripeness set forth in *Abbott* -- that the issues presented must be fit for judicial decision and the party seeking review must demonstrate that it will suffer hardship if court consideration is withheld, *Abbott,* 387 U.S. at 148-149, 87 S.Ct. at 1515 -- should always result in a finding that an enforced order, such as the one at issue here, is ripe for review. That it led to the opposite conclusion here, argues strongly for clarification of *Abbott.*

In evaluating whether a pre-enforcement claim presents a ripe controversy, courts look, *inter alia,* to whether the issues

require further factual development.[16] *Abbott*, 387 U.S. at 149-54, 87 S.Ct. at 1515-18. The district court held that the First Amendment issues in this case would not be ripe for review unless and until the City offered Liberty a franchise. Until then, the court held further factual development was needed to permit the court to consider "what the ultimate mix of [franchise] burdens will be" in order to determine "the appropriate level of scrutiny [ ] to evaluate plaintiffs' First Amendment challenge." App., *infra*, A-46-47.

The district court was plainly wrong. By definition, there *cannot* be a need for factual development to determine ripeness in post-enforcement review cases. The enforcement itself is the controversy sought to be adjudicated. Whether there is a factual basis to support the enforcement is a question for adjudication on the merits. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 1606-07, 84 L.Ed. 2d 643 (1985). A failure of an agency to support its enforcement by facts of record may result in a reversal or a remand, *id.*, but clearly, it cannot result in finding that the enforcement itself is not ripe for review. Accordingly, no further factual development can be needed to establish concreteness after an agency acts.

Similarly, the hardship prong of *Abbott* must, *a fortiori*, be satisfied when applied to an enforced order. The hardship aspect of ripeness is related to the requirement that the effects of the administrative decision be "felt in a concrete way by the challenging parties." *Abbott*, 387 U.S. at 148-49, 87 S.Ct. at 1515. In analyzing the second *Abbott* factor, the district court failed to recognize that an injunction that actually restricts protected First Amendment conduct necessarily constitutes harm sufficient to satisfy *Abbott*.

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[16] Courts also consider whether an agency action is "final." The district court's opinion does not hold that the Standstill Order is not final for ripeness purposes. While the order is interim, it has the immediate effect of enjoining behavior. Under the "flexible view of finality" endorsed by the Court in *Abbott*, the Standstill Order is "final." 387 U.S. at 149-51, 87 S.Ct. at 1516-17.

In *Abbott,* the Court found that a plaintiff who had to choose between compliance with agency regulations and the risk of potential governmental enforcement actions asserted a claim that satisfied the second prong of the ripeness analysis. 387 U.S. at 152-53, 87 S.Ct. at 1517-18. A claim is concrete, *inter alia,* as soon as the impact of a rule can "be said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Toilet Goods Assn.,* 387 U.S. at 164, 87 S.Ct. at 1524. When a regulation is applied in some "acute fashion," it is ripe for review. *Catholic Social Services,* 113 S.Ct. at 2496. "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation *or enforcement.*" *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)[17] (emphasis added). That the nature, or even the fact, of government enforcement actions was uncertain did not diminish the sufficiency of the harm imposed on the party seeking review. Once the party's conduct had been molded by the choice between compliance and risking government enforcement, harm sufficient to satisfy the second prong had been demonstrated. *Id.*

Abbott, a case which never questioned that review of an enforced order was ripe and expanded the circumstances for *pre*-enforcement review, is now, ironically, the basis for holding that courts should not review the merits of an enforced order. The danger of not correcting the lower courts' error is the creation of an unwarranted barrier to judicial review of administrative restraints on the exercise of First Amendment rights.

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[17] Stated conversely, review of a rule may not be ripe when "no irremediable adverse consequences flow from requiring a later challenge to [the] regulation. . . ." *Toilet Goods Assn.*, 387 U.S. at 164, 87 S.Ct. at 1525. The Court has found that controversies were not ripe when "adverse consequences" of a rule did not occur. *See Catholic Social Services,* 113 S.Ct. 2485; *National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177.

5. *The Lower Courts Erred in Relying on Beach.* The courts below relied upon the D.C. Circuit's holding in *Beach I* that the *Beach* plaintiffs' First Amendments claims were not ripe. The lower courts' reliance was misplaced.[18]

Beach is a typical pre-enforcement case. The *Beach* petitioners were four separate satellite master antenna television system ("SMATV") operators located in various parts of the country who brought a purely facial challenge to the FCC definitional order interpreting the Common Ownership Requirement. None of the *Beach* petitioners had been subject to an attempt by a state or locality to enforce the Common Ownership Requirement.

In contrast to *Beach*, this case was commenced by Liberty after the issuance of the administrative injunction had prevented it from engaging in speech and press activity. In addition, Liberty was and is being compelled to seek a franchise from the City of New York, which is bound by federal, state and local law to include a number of very specific burdens in any cable television franchise that it issues. These burdens are discussed *supra* at 9, n.11. App., *infra,* A-139-46; A-184-87. Thus, the peculiar, local facts that the D.C. Circuit could not determine in *Beach I* are well known here.

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[18] The district court's reliance on *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), is wholly misplaced. *Preferred Communications* was not a ripeness case and did not involve any ripeness analysis by the Ninth Circuit or this Court. Rather, the Ninth Circuit actually invalidated the challenged City ordinance -- an exclusive franchise provision -- as violative of the plaintiff's First Amendment right to provide cable television service to subscribers. 754 F.2d 1396 (9th Cir. 1985). The Supreme Court affirmed the Ninth Circuit's holding on narrower grounds and remanded the case for further factual development regarding the feasibility of making a second franchise available to *Preferred.* On appeal after remand, the Ninth Circuit merely sought additional fact finding on the effect of the issuance of a second franchise to plaintiff before ruling on the constitutionality of the City's action. *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1994), *cert. denied*, __U.S.__, 114 S.Ct. 2738, 129 L.Ed.2d 859 (1994).

Moreover, the extensive burdens that the New York City franchise must impose upon Liberty obviates the *Beach I* court's concern that, "a locality could adopt a summary process for franchising every external, quasi-private SMATV facility, and local SMATV operators could discharge their Sec. 621(b)(1) obligation by complying with this process," and that "[s]uch a franchising regime would pose very different First Amendment problems than a costly exclusive-franchising system." 959 F.2d at 984.

Far from supporting the lower court decisions, *Beach* underscores that the decisions below threaten fundamental constitutional values and conflict with decisions of this Court and other courts of appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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LIBERTY CABLE COMPANY, INC.; Sixty Sutton Corp.; Jack A. Veerman, Plaintiffs-Appellants,

v.

CITY OF NEW YORK; Ralph A. Balzano, Commissioner of Department of Information and Telecommunications, NYS Commission on Cable Television, William B. Finneran, Gerard D. DiMarco, Barbara T. Rochman, David F. Wilbur, and John Passidomo, Defendants-Appellees,

UNITED STATES of America, Time Warner Cable of New York City and Paragon Cable Manhattan, Defendants-Intervenors-Appellees.

No. 2034, Docket 95-6041.

United States Court of Appeals,
Second Circuit.

Argued June 1, 1995.

Decided July 12, 1995.

Operator of noncommon cable television systems in city brought action against city and agencies and officials of city and state, seeking declaratory judgment that certain provisions of Cable Communications Policy Act were unconstitutional on their face and as applied. Operator moved for preliminary injunction to enjoin defendants from enforcing Act so as to require operator either to cease providing service to subscribers or to obtain franchise from city and to enjoin order of New York State Commission on Cable Television (NYSCCT) prohibiting operator from hooking up any new noncommon systems. The United States District Court for the Southern District of New York, Loretta A. Preska, J., 893 F.Supp. 191, denied motion. Operator appealed. The Court of Appeals, Jon O. Newman, Chief Judge, held that city satisfied its due process obligations to operator by acting with reasonable dispatch to institute rulemaking proceeding upon receipt of operator's application for franchise

Affirmed.

1. Constitutional Law 230.3(1)

For due process purposes, governmental entity satisfies its licensing obligations by acting with reasonable expedition to develop rules for obtaining licenses in specialized, technical field. U.S.C.A. Const.Amend. 14.

2. Constitutional Law 230.3(6)

Telecommunications 449(7)

City satisfied its due process obligations to operator of noncommon cable television systems in city by acting with reasonable dispatch to institute rulemaking proceeding upon receipt of operator's application for franchise, despite contention that fact that federal and New York laws required operator to obtain franchise from local franchising authority and yet that no franchise procedure was currently available in city for operators of noncommon cable systems was denial of operator's property without due process, where there was no evidence of unreasonable administrative delay, and operator had opportunity to participate in city's rulemaking proceeding. U.S.C.A. Const.Amend. 14; Communications Act of 1934, §§ 602(7), 621(b)(1), as amended, 47 U.S.C.A. §§ 522(7), 541(b)(1); N.Y.McKinney's Executive Law § 819, subd. 1.

3. Constitutional Law 318(1)

Party's due process rights are not violated when it may participate fully in administrative agency proceeding and later seek state-court review. U.S.C.A. Const.Amend. 14.

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Rowan D. Wilson, New York City (Stuart W. Gold, Cravath, Swaine & Moore, New York City, Martin J. Schwartz, Richard G. Primoff, Rubin Baum Levin Constant & Friedman, New York, NY, on the brief), for defendants-intervenors-appellees Time Warner Cable of N.Y.C., and Paragon Cable Manhattan.

Before: NEWMAN, Chief Judge, LUMBARD and JACOBS, Circuit Judges.

JON O. NEWMAN, Chief Judge:

[1] This appeal by a television cable company from the denial of a motion for a preliminary injunction primarily concerns the extent of governmental obligations to develop franchising regulations for activities required to be licensed. Plaintiffs-appellants Liberty Cable Company, Inc. ("Liberty"), Sixty Sutton Corporation, and Jack A. Veerman appeal from the March 14, 1995, order of the District Court for the Southern District of New York (Loretta A. Preska, Judge), dismissing their complaint in part and denying their motion for a preliminary injunction. Defendants-appellees are the City of New York (the "City") and agencies and officials of the City and of the State of New York. Because we agree with the District Court that a governmental entity satisfies its

licensing obligations by acting with reasonable expedition to develop rules for obtaining licenses in a specialized, technical field, we affirm the denial of a preliminary injunction on the basis of the comprehensive and carefully reasoned opinion of Judge Preska. *See* 893 F.Supp. 191 (S.D.N.Y.1995).

Liberty operates what are known as "noncommon" cable systems in New York City. A non-common cable system is a Satellite Master Antenna Television ("SMATV') facility that does not use public property or rights of way to provide cable services but connects by hard wire two or more multi-unit dwellings that are not commonly owned, controlled, or managed. Non-common systems fall within the definition of a "cable system," *see* 47 U.S.C. § 522(7), and are thus subject to all the requirements that the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (1988 & Supp. V 1993) (the "Cable Act") imposes on cable operators.[1] The plaintiffs-appellants' complaint sought a declaratory judgment that certain provisions of the Cable Act were unconstitutional on their face and as applied. Their motion for a preliminary injunction sought to enjoin appellees from enforcing the Cable Act so as to require Liberty either to cease providing service to subscribers in its non-common systems or to obtain a franchise from the City. Appellants also attempted to enjoin a December 9, 1994, standstill order issued by appellee New York State Commission on Cable Television ("NYSCCT"), prohibiting Liberty from hooking up any new non-common systems.

Appellants alleged that 47 U.S.C. § 522 (7) (defining "cable system") and 47 U.S.C. § 541(b)(1) (stating that cable operators may not provide cable services without a franchise) as well as the state standstill order violated their First Amendment, due process and equal protection rights. Time

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[1] "Non-common" cable systems are to be distinguished from "common" cable systems, which are SMATV facilities that connect by wire only buildings under common ownership, control, or management. Common cable systems are not cable systems within the meaning of the Cable Act and are not subject to any of the requirements imposed under that statute.

Warner Cable of New York City and Paragon Cable Manhattan, franchised competitors of Liberty, intervened seeking dismissal of the complaint. Judge Preska held that appellants' First Amendment claims were unripe under *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d F 681 (1967), and *Beach Communications, Inc. v. F.C.C.,* 959 F.2d 975 (D.C.Cir.1992) (finding petitioners' facial challenge to the same provisions of the Cable Act at issue here not ripe for adjudication). She further held that their due process claims were unripe. Though the District Court found that appellants' equal protection challenges were ripe, it nonetheless denied the preliminary injunction, concluding that Liberty and its subscribers could not demonstrate either a "likelihood of success on the merits" or "irreparable harm," *see Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979).

[2] We affirm on Judge Preska's opinion and write only to add a few additional words of clarification on the issue of whether Liberty is being denied due process. Liberty argued to the District Court that its denial of due process was based in part on the fact that federal and state laws require it to obtain a franchise from the local franchising authority, *see* 47 U.S.C. § 541(b)(1); N.Y. Executive Law art. 28, § 819(1) (McKinney 1982), yet no franchise procedure is currently available in New York City for cable operators, like Liberty, who operate non-common systems. Thus, Liberty contends, the fact that it is required to obtain a franchise but cannot now apply for a franchise is a "Catch-22" predicament that constitutes a denial of its property without due process.

In ruling that Liberty's due process claims were not yet ripe for adjudication, the District Court stated that "a procedure is in place through which Liberty can obtain a franchise." Though this statement is not literally correct, since New York City does not yet have a final procedure for the granting of so-called "off-street" franchises, we understand the District Court to have been referring to the fact that the City is presently *creating* an off-street franchise procedure through a rulemaking proceeding. The City began that proceeding in

February 1995, less than four months after Liberty first applied for its franchise on October 28, 1994. Liberty contends that the City may not require franchises for non-common systems without having a licensing procedure for such systems already in place. In the circumstances of this case, we disagree.

Liberty is apparently the first cable operator ever to have approached the City about acquiring a franchise for a non-common system. Such systems are not in widespread use, and we were informed at oral argument that no city currently has franchising regulations in place for such systems. In a technical field like cable television, a governmental entity, authorized to license a variety of cable systems, is not required to anticipate all of the different types of service that cable operators might wish to render and keep licensing regulations on the shelf for every variety of applicant that might request a franchise. The City satisfied its due process obligations by acting with reasonable dispatch to institute a rulemaking proceeding upon receipt of Liberty's application. So long as the City does not unduly delay the completion of the rulemaking proceeding and, upon its completion, acts with reasonable diligence in processing Liberty's franchise application, Liberty will have received all the process that is due.

On the present record, there is no evidence of unreasonable administrative delay. Liberty first applied for an off-street franchise in October 1994. The City published a notice of proposed rulemaking on February 24, 1995, received public comment on its proposed rules during a comment period that closed on April 3, 1995, held a public hearing on April 4, 1995, and is now in the process of formulating final rules—all within a span of nine months. CF. *Mathews v. Eldridge,* 424 U.S. 319, 342, 96 S.Ct. 893, 906-07, 47 L.Ed.2d 18 (1976) (greater than one-year delay for hearing on termination of disability benefits did not violate due process); *Ritter v. Cohen,* 797 F.2d 119, 124 (3d Cir.1986) (delay of 20 months in holding post-termination hearing not violative of due

process); *Givens v. United States R.R. Retirement Board,* 720 F.2d 196, 201 (D.C.Cir.1983) (delay of 19 months in appeal of denial of railroad benefits not a denial of due process), *cert. denied,* 469 U.S. 870, 105 S.Ct. 219, 83 L.Ed.2d 149 (1984); *Frock v. United States R.R. Retirement Board,* 685 F.2d 1041, 1047 n. 13 (7th Cir. 1982) (delay of two years in processing application for railroad benefits did not violate due process), *cert. denied,* 459 U.S. 1201, 103 S.Ct. 1185, 75 L.Ed.2d 432 (1983). Under the circumstances, Liberty is not being denied due process.

[3] Furthermore, like any other member of the public, Liberty had the opportunity to participate in the City's rulemaking proceeding. Moreover, Liberty now has the chance to raise its constitutional claims before the NYSCCT and perhaps on judicial review. *See, e.g., Christ the King Regional High School v. Culvert,* 815 F.2d 219, 225 (2d Cir.) (constitutional issues may be decided in Article 78 proceeding under New York civil practice law), *cert. denied,* 484 U.S. 830, 108 S.Ct. 102, 98 L.Ed.2d 63 (1987); *Teleprompter of Mohawk Valley, Inc. v. Pumilio,* 57 A.D.2d 69, 394 N.Y.S.2d 945 (4th Dept.1977). A party's due process rights are not violated when it may participate fully in an administrative agency proceeding and later seek state-court review. *See, e.g., Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 483-84, 102 S.Ct. 1883, 1898-99, 72 L.Ed.2d 262 (1982).

The order of the District Court is affirmed.

T 1080
2/93

United States Court of Appeals
FOR THE SECOND CIRCUIT

ORIGINAL

Each motion must be accompanied by a supporting affidavit (Local Rule 27(c)).

LIBERTY CABLE COMPANY, INC., et al.

Plaintiffs-Appellants

v.

THE CITY OF NEW YORK, et al.

Defendants-Appellees

Use short title

95-6041

Docket Number

NOTICE OF MOTION

state type of motion

for Motion for Expedited Appeal

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

UNITED STATES COURT OF APPEALS
MARCH 22 1995
SECOND CIRCUIT

Lloyd Constantine
Constantine & Partners
909 Third Avenue
New York, NY 10022
(212) 350-2700

Attorneys for Plaintiff-Appellant,
Liberty Cable Company, Inc.

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

See attached Service List - Exhibit A

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No
(Substantive motions only)

Requested return date: As soon as possible
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

Judge Loretta A. Preska, S.D.N.Y.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested: Liberty requests that pending appeal, this Court restore the temporary restraining order issued by Judge Preska on December 22, 1994, insofar as that order restrains defendants-appellees, the City of New York and the New York State Commission on Cable Television ("NYSCC") from enforcing NYSCC's December 9, 1994, Standstill Order.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Lloyd Constantine

Signed name must be printed beneath

Lloyd Constantine

Appearing for: *(Name of party)*	Appellant or Petitioner: ☐ Plaintiff ☐ Defendant Appellee or Respondent: ☐ Plaintiff ☐ Defendant
Liberty Cable Company, Inc.	

Date	UNITED STATES COURT OF APPEALS FILED APR - 4 1995 SECOND CIRCUIT
March 22, 1995	

ORDER

Kindly leave this space blank

Before: NEWMAN, Chief Judge, WINTER and MAHONEY, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is granted. Appellant shall file a brief and joint appendix in two weeks; appellee shall file a brief 30 days later. Argument of appeal shall be heard the first available week thereafter subject to approval of that week's presiding judge.

GEORGE LANGE III, Clerk
By:

/s/ Edward J. Guardaro

Edward J. Guardaro,
Administrative Attorney

4/4/95

T 1080
2/93

United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by
a supporting affidavit (Local Rule 27(a)).

LIBERTY CABLE COMPANY, INC., et al.

Plaintiffs-Appellants

v.

THE CITY OF NEW YORK, et al.

Defendants-Appellees

Use short title

95-6041

Docket Number

NOTICE OF MOTION

state type of motion

for Injunction Pending Appeal

UNITED STATES COURT OF APPEALS
FILED
MARCH 22 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Lloyd Constantine
Constantine & Partners
909 Third Avenue
New York, NY 10022
(212) 350-2700

Attorneys for Plaintiff-Appellant,
Liberty Cable Company, Inc.

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

See attached Service List - Exhibit A

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ *Yes* ☐ *No*

(Substantive motions only)

Requested return date: As soon as possible

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

Judge Loretta A. Preska, S.D.N.Y.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: **See attached Exhibit B**

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested: Liberty requests that pending appeal, this Court restore the temporary restraining order issued by Judge Preska on December 22, 1994, insofar as that order restrains defendants-appellees, the City of New York and the New York State Commission on Cable Television ("NYSCC") from enforcing NYSCC's December 9, 1994, Standstill Order.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Lloyd Constantine

Signed name must be printed beneath

Lloyd Constantine

Appearing for: *(Name of party)*

Liberty Cable Company, Inc.

Appellant or Petitioner:
☒ Plaintiff ☐ Defendant
Appellee or Respondent:
☐ Plaintiff ☐ Defendant

Date

March 22, 1995

UNITED STATES COURT OF APPEALS
FILED
APRIL 6 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

ORDER

Before: NEWMAN, Chief Judge, WINTER and MAHONEY, Circuit Judges.

IT IS HEREBY ORDERED that the motion for an injunction pending appeal be and it hereby is denied without prejudice to renewal before the panel hearing the appeal.

GEORGE LANGE III, Clerk
By:

/s/ Arthur Heller

Arthur Heller,
Administrative Attorney

4/6/95

T 1080
2/93

United States Court of Appeals
FOR THE SECOND CIRCUIT

ORIGINAL

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

LIBERTY CABLE COMPANY, INC., et al.

Plaintiffs-Appellants

v.

THE CITY OF NEW YORK, et al.

Defendants-Appellees

Use short title

95-6041
Docket Number

NOTICE OF MOTION

state type of motion

for Renewal of injunction pending appeal at the request of the Court

UNITED STATES COURT OF APPEALS
FILED
MAY 15 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Lloyd Constantine
Constantine & Partners
909 Third Avenue
New York, NY 10022
(212) 350-2700

Attorneys for Plaintiff-Appellant,
Liberty Cable Company, Inc.

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

See attached Service List - Exhibit A

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☐ No
(Substantive motions only)

Requested return date: As soon as possible
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☐ No
B. by firm date of argument notice? ☒ Yes ☐ No
C. If Yes, enter date: 6/1/95

Judge or agency whose order is being appealed:

Judge Loretta A. Preska, S.D.N.Y.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested: Liberty requests thatpending appeal, this Court restore the temporary reatraining order issued by Judge Preska on December 22, 1994, insofar as that order restrains defendants-appellees, the City of New York and the New York State Commission on Cable Television ("NYSCC") from enforcing NYSCC's December 9, 1994, Standstill Order.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Lloyd Constantine

Signed name must be printed beneath

Lloyd Constantine

Appearing for: *(Name of party)*	Appellant or Petitioner: ☒ Plaintiff ☐ Defendant Appellee or Respondent: ☐ Plaintiff ☐ Defendant
Liberty Cable Company, Inc.	

Date

May 15, 1995

UNITED STATES COURT OF APPEALS
FILED
JUNE 9 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/ Jon O. Newman

/s/ J. Edward Lumbard

9 June 95 /s/ Dennis G. Jacobs

Date Circuit Judge

FPI-RBK

T 1080
2/93

United States Court of Appeals PAGE 1
FOR THE SECOND CIRCUIT

ORIGINAL

Each motion must be accompanied by a supporting affidavit (Local Rule 27(c)).

LIBERTY CABLE COMPANY, INC., et al.

Plaintiffs-Appellants

v.

THE CITY OF NEW YORK, et al.

Defendants-Appellees

Use short title

95-6041

Docket Number

NOTICE OF MOTION

state type of motion

for Motion for Expedited Appeal

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

UNITED STATES COURT OF APPEALS
SEP 15 1995
SECOND CIRCUIT

Lloyd Constantine
Constantine & Partners
909 Third Avenue
New York, NY 10022
(212) 350-2700

Attorneys for Plaintiff-Appellant,
Liberty Cable Company, Inc.

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

See attached Service List - Exhibit A

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No
(Substantive motions only)

Requested return date: As soon as possible
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

Second Circuit's July 12, 1995 Decision in the above-captioned matter.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

---

Brief statement of the relief requested: Liberty requests to supplement the pending Petition for Rehearing by the Declaration of Lloyd Constantine dated September 15, 1995.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Lloyd Constantine

Signed name must be printed beneath

Lloyd Constantine

Appearing for: *(Name of party)*	Appellant or Petitioner: ☐ Plaintiff ☐ Defendant
Liberty Cable Company, Inc.	Appellee or Respondent: ☐ Plaintiff ☐ Defendant

Date	UNITED STATES COURT OF APPEALS FILED SEP 28, 1995 SECOND CIRCUIT
Sept. 15, 1995	

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is **granted**.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

United States Court of Appeals, Second Circuit, Filed September 18, 1995, George Lange III, Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18 day of September one thousand nine hundred and ninety-five.

Liberty Cable

v

Dkt No: 95-6041

City of New York

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant LIBERTY CABLE COMPANY, INC.,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador

Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of July, one thousand nine hundred and ninety-five.

PRESENT: HON. JON O. NEWMAN,
Chief Judge,
HON. J. EDWARD LUMBARD
HON. DENNIS G. JACOBS,
Circuit Judges.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED JULY 12, 1995
GEORGE LANGE III, CLERK

Docket No. 95-6041

LIBERTY CABLE COMPANY, INC.,; SIXTY SUTTON CORP; JACK A. VEERMAN,

Plaintiff-Appellant,

v.

CITY OF NEW YORK; RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications; NYS COMMISSION ON CABLE TELEVISION; WILLIAM B. FINNERAN; GERARD D. DIMARCO; BARBARA T. ROCHMAN; DAVID F. WILBUR; JOHN NMI PASSIDOMO,

Defendants-Appellees,

UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY and PARAGON CABLE MANHATTAN,

Defendants-Intervenors-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the order of said district court be and it hereby is affirmed in accordance with the opinion of this Court.

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador

Administrative Attorney

A TRUE COPY
GEORGE LANGE III, CLERK

/s/ George Lange III

LIBERTY CABLE COMPANY, INC., Sixty Sutton Corp. and Jack A. Veerman, Plaintiffs,

v.

The CITY OF NEW YORK and Ralph A. Balzano, Commissioner of Department of Information Technology and Telecommunications, The New York State Commission on Cable Television, William B. Finneran, Gerard D. Di Marco, Barbara T. Rochman, David F. Wilbur, and John Passidomo, Defendants,

The United States of America, Time Warner Cable of New York City and Paragon Cable Manhattan, Defendants-Intervenors.

No. 94 Civ. 8886 (LAP).

United States District Court,
S.D. New York.

March 13, 1995.

Operator of noncommon cable television systems in city and its subscribers brought action against city and agencies and officials of city and state, seeking declaratory judgment that provisions of Cable Communications Policy Act were unconstitutional on their face and as applied. Plaintiffs moved for preliminary injunction to enjoin defendants from enforcing Act so as to require operator either to cease providing service to subscribers or to obtain franchise from city and to enjoin order of New York State Commission on Cable Television (NYSCC) prohibiting operator from hooking up any new noncommon systems. Defendants moved to dismiss complaint. The District Court, Preska, J., held that: (1) operator's First Amendment and due process challenges to Act provisions requiring operator to obtain franchise from local franchising authority were not ripe for adjudication; (2) subscribers' First Amendment and due process challenges to provisions were not ripe for adjudication; (3) plaintiffs' equal protection challenge to Act provision was ripe for

adjudication; (4) plaintiffs were not entitled to preliminary injunction against enforcement of Act, respecting equal protection challenge to Act provision requiring operators of noncommon systems, but not operators of systems connecting commonly owned buildings, to obtain franchise from local franchising authority; and (5) plaintiffs' remaining miscellaneous claims were not ripe for adjudication.

Motion to dismiss granted in part and denied in part, motion for preliminary injunction denied.

Affirmed 60 F.3d 961.

1. Telecommunications~449(6.1)

Under Cable Communications Policy Act, satellite master antenna television (SMATV) is type of cable service that can fit within private cable exemption and, when it does, need not obtain franchise. Communications Act of 1934, § 602(7), as amended, 47 U.S.C.A. § 522(7).

2. Federal Civil Procedure~1832

When considering motion to dismiss based on lack of jurisdiction, court may consider matters outside pleadings. Fed.Rules Civ.Proc.Rule 12(b)(1, 2), 28 U.S.C.A.

3. Federal Courts~12.1

Ripeness is constitutional prerequisite to exercise of jurisdiction by federal courts.

4. Administrative Law and Procedure ~704

Rationale behind requirement of ripeness is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties.

5. Federal Courts ~12.1

Ripeness turns on whether there are future events so contingent in nature that there is no certainty they will ever occur

6. Federal Courts ~ 12.1

In determining whether issue is properly considered ripe for adjudication, courts are to conduct two-pronged inquiry: first, court must evaluate fitness of issues for judicial decision and, second, court must look to hardship to parties of withholding court consideration.

7. Administrative Law and Procedure ~704

In determining whether issues are fit for review as part of ripeness determination, court must look to whether administrative agency action is final and whether issue is purely legal or whether consideration of underlying legal issues would necessarily be facilitated if they were raised in context of specific attempt to enforce regulations.

8. Federal Courts~13

First Amendment challenge, of operator of noncommon cable television systems in city, to Cable Communications Policy Act provisions requiring operator to obtain franchise from local franchising authority was not ripe for adjudication; neither New York State Commission on Cable Television (NYSCC) nor authority had taken final action as to operator, appropriate level of First Amendment scrutiny was unknown due to uncertainty as to precise burdens which would be imposed on operator, no particular hardship would befall operator and its subscribers if judicial decisionmaking was withheld, and substantial hardship would be imposed on Commission and authority respecting their ongoing proceedings if operator and subscribers were allowed to proceed in court. U.S.C.A. Const.Amend. 1; Communications Act of 1934, §§ 602(7), 621(b), as amended, 47 U.S.C.A. §§ 522(7), 541(b).

9. Federal Courts ~13

Due process challenge, of operator of noncommon cable television systems in city, to Cable Communications Policy Act provisions requiring operator to obtain franchise from local franchising authority was not ripe for adjudication, in light of city franchising authority's initiation of rulemaking proceeding to establish procedures for obtaining franchise for operation of such systems in city. U.S.C.A. Const.Amend. 14; Communications Act of 1934, §§ 602(7), 621(b), as amended, 47 U.S.C.A. §§ 522(7), 541(b).

10. Federal Courts 13

First Amendment challenge, of subscribers to noncommon cable television systems in city, to Cable Communications Policy Act provisions requiring operator of systems to obtain franchise from local franchising authority was not ripe for adjudication; there was no record from which to assess First Amendment interest at stake and weigh it against public interest allegedly served by regulation, there was no final agency action on the issue, any hardship to subscribers was speculative, and hardship to New York State Commission on Cable Television (NYSCC) and city franchising authority from present adjudication of case was significant, including premature judicial meddling in their processes. U.S.C.A. Const.Amend. 1; Communications Act of 1934, §§ 602(7), 621(b), as amended, 47 U.S.C.A. §§ 522(7), 541(b).

11. Constitutional Law ~90.4(1)

Under First Amendment, person may read pornography in privacy of his or her own home. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ~90.1(1)

Under First Amendment, government may regulate speech activity, even speech activity taking place in person's home, to protect interests of third parties. U.S.C.A. Const.Amend. 1.

13. Federal Courts ~13

Equal protection challenge, of operator of noncommon cable television systems in city and operator's subscribers, to Cable Communications Policy Act provision requiring operators of such systems, but not operators of cable television systems connecting commonly owned buildings, to obtain franchise from local franchising authority was ripe for adjudication; challenge did not depend on particular circumstances. U.S.C.A. Const.Amend. 5; Communications Act of 1934, § 602(7), as amended, 47 U.S.C.A. § 522(7).

14. Federal Courts 47.1

District court would not abstain from adjudicating equal protection challenge, of operator of noncommon cable television systems in city and operator's subscribers, to Cable Communications Policy Act provision requiring operators of such systems, but not operators of cable television systems connecting commonly owned buildings, to obtain franchise from local franchising authority, in action brought by operator and subscribers against city and agencies and officials of city and state. U.S.C.A. Const.Amend. 5; Communications Act of 1934, § 602(7), as amended, 47 U.S.C.A. § 522(7).

15. Federal Courts ~41

Presence of federal basis for jurisdiction may raise level of justification needed for federal court abstention.

16. Federal Courts ~41

Federal court abstention remains exception, not the rule.

17. Injunction~ 138.1

Party moving for preliminary injunctive relief must demonstrate irreparable harm and either likelihood of success on the merits of sufficiently serious questions going to the merits to make them fair ground for litigation and balance of hardships tipping decidedly toward party requesting preliminary relief.

18. Telecommunications ~449.10(2)

Operator of noncommon cable television systems in city and its subscribers were not entitled to preliminary injunction against enforcement of Cable Communications Policy Act, respecting equal protection challenge to Act provision requiring operators of such systems, but not operators of cable television systems connecting commonly owned buildings, to obtain franchise from local franchising authority; operator and subscribers showed neither that they had likelihood of success on the merits, nor that there were sufficiently serious questions going to the merits as to make them fair ground for litigation, and they had not demonstrated irreparable harm or balance of hardships tipping decidedly in their favor. U.S.C. A. Const. Amend. 5; Communications Act of 1934, ~ 602(7), as amended, 47 U.S.C.A. § 522(7).

I9. Federal Courts ~13

Challenge, of operator of noncommon cable television systems in city and operator's subscribers, to city council's resolution authorizing city franchising authority to grant cable television franchises, on ground that resolution imposed terms and conditions more burdensome than those allowed by Cable Communications Policy Act and by state law, was not ripe for adjudication; resolution did not impose any terms and conditions directly upon operator, and franchise had not yet been issued to operator. Communications Act of 1934, §§ 601 et seq., 621(a)(1), as amended, 47 U.S.C.A. §§ 521 et seq., 541(a)(1); N.Y.McKinney's Executive Law §§ 812(2), 819, subds. l, 2.

20. Federal Courts ~13

Claim, of operator of noncommon cable television systems in city and operator's subscribers, that Cable Communications Policy Act and Federal Communications Commission (FCC) decisions had preempted regulatory authority of city over provision of "premium" cable television service to subscribers to the extent that city could not prevent receipt of operator's "premium" service by subscribers, was not ripe for

adjudication; city had not prevented receipt of operator's "premium" service, and it was not yet known what actions city might take. Communications Act of 1934, § 601 et seq., as amended, 47 U.S.C.A. § 521 et seq.

Robert Begleiter, Lloyd Constantine, Leslie F. Spasser, Eliot Spitzer, Constantine & Partners, New York City, for plaintiff Liberty Cable Co., Inc.

W. James MacNaughton, Woodbridge, NJ, for plaintiffs Sixty Sutton Corp. and Jack A. Veerman.

Paul A. Crotty, Corp. Counsel of the City of New York by Lewis S. Finkelman, Daniel J. Struck, New York City, for defendants The City of New York and Ralph A. Balzano.

Dennis C. Vacco, Atty. Gen. of State of New York by Marilyn T. Trautfield, Jeanne Lahiff, New York City, for defendants The New York State Com'n on Cable Television, William B. Finneran, Gerard D. Di Marco, Barbara T. Rochman, David F. Wilbur, and John Passidomo.

Mary Jo White, U.S. Atty. by Kathy S. Marks, Asst. U.S. Atty., New York City, for defendant-intervenor The U.S.

Martin J. Schwartz, Richard G. Primoff, Rubin Baum Levin Constant & Friedman and Stuart W. Gold, Rowan D. Wilson, Cravath, Swaine & Moore, New York City, for defendants-intervenors Time Warner Cable of New York City and Paragon Cable Manhattan.

OPINION

PRESKA, District Judge:

Plaintiffs Liberty Cable Co., Inc. ("Liberty"), Sixty Sutton Corp. ("Sixty Sutton"), and Jack A. Veerman seek, *inter alia*, a declaratory judgment that 47 U.S.C. §§ 522(7) and 541(b) are unconstitutional. Before me now is their motion for a

preliminary injunction against agencies and officials of New York State (the "State") and the City of New York (the "City") and defendants' motion to dismiss the complaint. For the reasons stated below, the complaint is dismissed as to certain claims and, as to the remainder, plaintiffs' motion for a preliminary injunction is denied.

BACKGROUND

I. *The Statutory Scheme Governing Cable Television*

"Cable operators" in the City of New York are regulated on the federal, state, and city level. On the federal level, the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.* (the "Cable Act") regulates "cable operators." A "cable operator' is defined in pertinent part as "any person or group of persons ... who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system." 47 U.S.C. § 522(5). A "cable system" is defined in pertinent part as: ;

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include ... a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

47 U.S.C. § 522(7). The exclusion in the definition of a cable franchise has been referred to as the "private cable exemption."

Aside from exceptions not relevant here, "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b). A "franchise" is "an initial authorization, or renewal thereof ... issued by a franchising authority ... which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9). A "franchising authority" is defined as "any

governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(10). Thus, a cable operator must look to state and/or local authorities to obtain a franchise.

However, not all types of cable systems need comply with this regulatory scheme. Under the "private cable exemption" of the Cable Act, a cable system is exempt from these franchising requirements if it meets two tests. First, it must be a system confined to commonly owned, controlled, or managed multiple unit dwellings. 47 U.S.C. § 522(7). Second, the system must not use any public right-of-way, for example, by placing coaxial cable or hard wire above or under public streets or rights of way. *Id.* Traditional cable systems, which are subject to regulation, deliver programming by means of coaxial cables that physically connect the cable operator with the subscriber and that generally are laid under city streets or along utility lines.

[1] Satellite master antenna television ("SMATV"), however, is a type of cable service that can fit within the private cable exemption and, when it does, need not obtain a franchise. *See F.C.C. v. Beach Communications,*—U.S__. __ __,,113 S.Ct. 2096, 2099-2100, 124 L.Ed.2d 211 (1993) (citing *In re Definition of a Cable Television Sys;* 5 F.C.C.Rcd. 7638 (1990)).[1] SMATV provides cable service by means of a satellite dish and reception facilities installed on the grounds of private buildings. Under 47 U.S.C. § 522(7), a SMATV system that uses cable to link more than one multiple unit dwelling under common ownership, control, or management falls within the private cable exemption. However, a SMATV system that uses cable to link more than one multiple unit dwelling *not* under common ownership,

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[1] The litigation in the *Beach* case has been fairly protracted. For ease of reference, the decisions will be referred to as follows: *Beach Communications v. F.C.C.,* 959 F.2d 975 (D.C.Cir.1992) *("Beach I "), appeal after remand,* 965 F.2d 1103 (D.C.Cir.1992) *("Beach II"), rev'd,—U.S.—,* 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) *("Beach III"), on remand,* 10 F.3d 811 (D.C.Cir.1993) ("*Beach IV*").

control, or management does not fall within the private cable exemption and is subject to the regulation imposed by the Cable Act.

After the federal regulations, the next levels of regulation a would-be cable operator in the City of New York must look to are the State and then the City. New York law provides that a cable television system may not commence or expand its operations without a franchise from the municipality in which it proposes to provide or expand service. N.Y.Exec.Law § 819(1) (McKinney 1982). In New York, a "cable television system" is defined as:

> any system which operates for hire the service of receiving and amplifying programs broadcast by one or more television or radio stations or any other programs originated by a cable television company or by any other party, and distributing such programs by wire, cable, microwave or other means, whether such means are owned or leased, to persons in one or more municipalities who subscribe to such service.

N.Y.Exec.Law § 812(2) (McKinney 1982 & Supp.1995). New York law also authorizes municipalities to grant the franchises which are required of cable television systems:

> A municipality shall have the power to require a franchise of any cable television system providing service within the municipality, notwithstanding that said cable television system does not occupy, use or in any way traverse a public street. The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises.

N.Y.Exec.Law § 819(2). Once a franchise has been awarded by the municipality, it must be confirmed by the New York State Commission on Cable Television ("NYSCC") to be effective. N.Y.Exec.Law § 821(1) (McKinney 1982).

In New York City, the municipal franchising agency authorized by the New York City Charter to grant franchises to cable television systems is the Department of Information Technology and Telecommunications ("DOITT"), formerly the Department of Telecommunications and Energy. Chapter 48, § 1072(c). On October 13, 1993, the New York City Council authorized Resolution No. 1639 ("Resolution 1639"), which states in pertinent part that:

> The Council authorizes the Department of Telecommunications and Energy to grant non-exclusive franchises for the provision of cable television services and the installation of cable television facilities and associated equipment on, over, and under the inalienable property of the City of New York.

(Resolution 1639).[2]

On February 24, 1995, after the plaintiffs had commenced the instant action, DOITT issued a notice of rulemaking regarding solicitations for franchises for the provision of cable service in a manner that does *not* use the inalienable property of the City (the "New Rulemaking"). (Second Bronston Aff. ¶¶ 1-2, Ex. A).[3] The notice stated, *inter alia* that the public written comment period for the proposed rules will close on April 3, 1995, and a public hearing is scheduled for April 4, 1995. (Second Bronston Aff. ¶ 3, Ex. A). The proposed rules also include deadlines for the submission of franchise applications, DOITT's review of such applications, and the preparation of agreements. (Second Bronston Aff. ¶ 3, Ex. A). Agreements must be approved by the Franchise and Conces-

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[2] A copy of Resolution 1639 can be found annexed to the Affidavit of John Grow executed January 30, 1995 ("Grow Aff.") at exhibit 10 and to the First Amended Complaint dated December 13, 1994 ("First Amd. Compl.") as exhibit E.

[3] Reference is to the Supplemental Affidavit of David Bronston executed February 27, 1995 ("Second Bronston Aff.").

sion Review Committee and by the Mayor. (Second Bronston Aff., Ex. A, § 6-03).

II. *The Cable Services Provided By Liberty*

Liberty provides cable service in several different ways in the City, including the use of SMATV systems. (Price Aff. ¶3).[4] Liberty receives satellite and broadcast television signals at its "head end" facility on East 95th Street in Manhattan. (Price Aff. ¶ 5). These signals are processed and transmitted by microwave to reception antennae located on multiple unit buildings located throughout the greater metropolitan area. (Price Aff. ¶ 5). Liberty's reception antennae deliver cable service to building residents using one of three configurations. (Price Aff. ¶ 7).

The first type of system employed by Liberty is known as the "Stand Alone System" configuration. The Stand Alone System utilizes a single microwave reception antenna to deliver cable service to the residents of the single building where the antenna is located. (Price Aff. ¶ 8).

The second system used by Liberty, referred to as the "Common System" configuration, utilizes a single microwave reception antenna located on the roof of a multiple unit dwelling to deliver cable service to two or more proximate multiple unit buildings under common ownership, control or management. (Price Aff. ¶ 9). The building with the antenna is linked by coaxial cable to the other buildings, without using public property. (Price Aff. ¶ 9).

Under 47 U.S.C. § 522(7), Liberty's Stand Alone Systems and Common Systems are SMATV systems subject to the private cable exemption, not "cable systems." These two systems are classified as such because they meet the common ownership requirement set forth in that section and do not use the public right-of-way.

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[4] Reference is to the Affidavit of Peter O. Price executed December 20, 1994 (the "Price Aff.").

The third system used by Liberty, and the one in controversy here, is Liberty's "Non-Common System" configuration. With the Non-Common System, a single microwave reception antenna is located on the roof of a multiple unit dwelling to deliver service to two or more multiple unit dwellings. (Price Aff. ¶ 10). As with the Common Systems, the various buildings are linked with coaxial cable without using public property. *Id* However, unlike Liberty's Common Systems, the Non-Common System links buildings which are *not* commonly owned, controlled, or managed. *Id.* Plaintiff Sixty Sutton is one such building. *Id.* The reception antenna that serves Sixty Sutton is located on River Tower, a building that is not commonly owned, managed, or controlled with Sixty Sutton. (Price Aff. ¶ 11). Liberty constructed its Non-Common Systems, including the system at Sixty Sutton, during the period from January 1993 to August 1994. (Price Aff. ¶ 12).

III. *The Administrative Proceeding*

On or about May 31, 1994, the NYSCC received a complaint from Time Warner Cable of New York City ("Time Warner") and Paragon Cable Manhattan ("Paragon") which requested an investigation into how Liberty provided cable service in Manhattan. (Grow Aff., Ex. 1). Time Warner and Paragon, both traditional cable system operators, alleged that Liberty, which represents itself as an SMATV company, was actually improperly operating as a "cable operator," as defined by the Cable Act, without a franchise in violation of state and federal law. *Id.*

The NYSCC subsequently conducted an on-site investigation into Time Warner's charges against Liberty. Staff from the NYSCC conducted site inspections at two locations. At both locations, it was observed that a coaxial wire ran from one building to another, either across an alley or the rooftops of several other buildings. Each wire was also lashed to or ran alongside the wire of a franchised cable company. (Grow Aff. ¶ 3, Ex. 3).

In a letter to the NYSCC dated June 28, 1994,[5] Liberty acknowledged that Liberty was running cables among residential buildings on the same block. Liberty stated that many—but not all—of these buildings were under common ownership, management, or control. Liberty argued, however, that it was the City's policy that a franchise was unnecessary where cables did not use or cross public property and that because Liberty's cables did not use or cross public property, Liberty did not require a franchise. Liberty also stated that it wired its serviced buildings in such a fashion in reliance on the City's policy. (Grow Aff., Ex. 2).

By Order to Show Cause dated August 23, 1994 (the "Order to Show Cause"),[6] the NYSCC directed Liberty to show cause by September 18, 1994, why it should not be determined to be a cable television system subject to the franchising and confirmation requirements of State law or, alternatively, why it should not be compelled to remove all interconnections by wire of buildings not commonly owned, controlled, or managed and be ordered to cease and desist from providing cable television services by means of such wires, until Liberty obtained a franchise and certificate of confirmation. The Order to Show Cause also provided that Liberty was entitled to be heard and present evidence relating to the allegations stated. (Grow Aff. ¶ 7, Ex. 3).

Liberty requested two extensions of time in which to respond to the Order to Show Cause, the first for a period of thirty days, extending Liberty's time to respond to October 19, 1994. (Grow Aff. ¶8, Ex. 4). The request was granted. (Grow Aff. ¶8, Ex. 5). Liberty's second request, made in a letter dated October 18, 1994, was for an extension of one hundred-eighty days. (Grow Aff. ¶ 9, Ex. 6). Liberty explained that the reason for the extension was that Liberty was engaged in discussions with DOITT about obtaining a

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[5] A copy of this letter is annexed to the Grow Aff. as exhibit 2.

[6] A copy of the Order to Show Cause is annexed to the Grow Aff. as exhibit 3.

franchise and agreed not to construct any new Non-Common Systems during the one hundred-eighty day extension. *Id.* The NYSCC extended Liberty's time to respond to November 1, 1994. (Grow Aff. ¶ 9, Ex. 7). On October 31, 1994, Liberty filed its Answer and Appearance to the Order to Show Cause, again requesting an adjournment in order to negotiate with DOITT. (Grow Aff. ¶ 10, Ex. 9)

Liberty, meanwhile, sent a letter dated October 28, 1994, to DOITT expressing Liberty's interest in applying for a franchise pursuant to Resolution 1639. (Grow Aff. ¶ 10, Ex. 8). On October 31, 1994, DOITT informed the NYSCC that it was in receipt of Liberty's letter. (Grow Aff. ¶ 11, Ex. 10). DOITT stated that it expected to issue a Request For Proposals ("RFP")[7] within the next few months. *Id.*

On December 9, 1994, the first day of the administrative hearing, the NYSCC issued a standstill order (the "Standstill Order"). (Grow Aff. ¶ 12). The Standstill Order required that:

> there be no additional cable or closed transmission interconnections of buildings not commonly owned, controlled or managed and that in buildings where service was not currently being provided, that no new subscribers could be serviced through such hardware. Finally, Liberty was enjoined from energizing services at those buildings not commonly owned, controlled or managed presently connected by hard wire connecting that were not already energized.

(Grow Aff. ¶ 12, Ex. 11).

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[7] An RFP is part of the standard minimum franchising procedures of 9 NYCRR, Part 594, promulgated by the NYSCC. (Grow Aff. ¶ 1).

IV. *Proceedings In This Court*

On December 8, 1994, before the Commission's hearing began, Liberty, Sixty Sutton, and Bud Holman[8] filed a complaint in this Court which was subsequently amended on December 13, 1994.[9] On December 22, 1994, the plaintiffs applied for a temporary restraining order and preliminary injunction enjoining the defendants from enforcing or attempting to enforce 47 U.S.C. §§ 522(7) and 541 so as to require Liberty either (i) to cease serving subscribers in Liberty cable systems which serve more than one multiple unit dwelling not under common ownership, control or management and which do not use any public property or rights-of-way, *i.e.*, Liberty's Non-Common Systems, or (ii) to obtain a City franchise as a condition of continuing to serve such Non-Common Systems. Liberty and Sixty Sutton also sought to enjoin defendants from continuing to enforce the Standstill Order. A temporary restraining order was granted which, by consent of the parties, was extended to and included March 10, 1995.

In the meantime, Time Warner and Paragon moved to intervene in this action as defendants. The motion to intervene was granted on February 14, 1995.[10]

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[8] Bud Holman, one of Liberty's subscribers and a resident of Sixty Sutton, (First Amd.Comp. ¶ 5-6), subsequently filed a notice of voluntary dismissal pursuant to Fed.R.Civ.P. 41(a) in this action.

Jack A. Veerman, another Liberty customer and a member of the Board of Directors of Sixty Sutton (Affidavit of Jack A. Veerman ("Veerman Aff.") executed February 17, 1995 at ¶ 2), later joined the litigation as a plaintiff.

[9] The First Amended Complaint was later amended. A Second Amended Complaint was filed on February 21, 1995 ("Second Amd. Compl.").

[10] Those parties demonstrated both "an interest relating to the property or transaction which is the subject of th[is] action and [that they are] so situated that the disposition of the action may as a practical matter impede or impair [their] ability to protect that interest" and that their interest is not adequately represented by existing parties, (Fed.R.Civ.P. 24(a)) and that

(Footnote continued)

[2] The defendants have moved to dismiss the complaint on a variety of grounds, including ripeness and abstention. Extensive and useful oral argument was held on March 1, 1995 and March 3, 1995. For the reasons set forth below, defendants' motion to dismiss on the grounds of lack of ripeness is granted with respect to all of plaintiffs' claims except their equal protection claims; as to plaintiffs' equal protection claims, defendants' motions to dismiss are denied, and plaintiffs' motion for a preliminary injunction is denied.[11]

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one or more of their "claim[s] or defense[s] and the main action have a question of law or fact in common." (Fed. R.Civ.P. 24(b)).

[11] It is well-established that when considering a motion to dismiss based on lack of jurisdiction, a court may consider matters outside the pleadings. *See, e.g., Land v. Dollar,* 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 1011 n. 4, 91 L.Ed. 1209 (1947) (stating that when a question of the district court's jurisdiction is raised, "the court may inquire by affidavits or otherwise, into the facts as they exist"); *Theunissen v. Matthews,* 935 F.2d 1454, 1459 (6th Cir.1991) (noting that affidavits may be considered in deciding a motion pursuant to Fed.R.Civ.P. 12(b)(2)); *McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir.1988) (rejecting the argument that the district court's dismissal pursuant to Fed.R.Civ.P. 12(b)(1) should be treated as a summary judgment motion where the court considered matters outside the pleadings; "where considering a motion to dismiss pursuant to Rule 12(b)(1), the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction"), *cert. denied;* 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed2d 581 (1989);*Alfadda v.* Fenn, 751 F.Supp. 1114, 1118 (S.D.N.Y.1990) (stating that a court may resolve factual disputes when a party moves to dismiss for lack of subject matter jurisdiction), *rev'd on other grounds,* 935 F.2d 475 (2d Cir.), *cert. denied,* 502 U.S. 1005, 112 S.Ct. 638, 116 L.Ed.2d 656 (1991); *L'Europeenne de Banque v. La Republica de Venezuela,* 700 F.Supp. 114, 119 n. 6 (S.D.N.Y.1988) (stating that on a motion to dismiss for lack of jurisdiction, the court may look to affidavits as well as to the pleadings); *Loria & Weinhaus, Inc. v. H.R. Kaminsky & Sons, Inc.,* 80 F.R.D. 494, 497-98 (S.D.N.Y.1978) (noting that the pleadings and affidavits may be considered when determining whether to grant a motion to dismiss for lack of personal jurisdiction). Ripeness is a prerequisite to the exercise of jurisdiction by federal courts. *See, e.g., Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.,* 616 F.2d 45, 51 (2d Cir.1980). Consequently, despite my consideration of the affidavits and

(Footnote continued)

DISCUSSION

I. *Ripeness*

[3-5] The injunctive and declaratory remedies sought by Liberty and Sixty Sutton are "discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Ripeness is a "constitutional prerequisite to exercise of jurisdiction by federal courts." *Federal Election Comm'n. v. Central Long Island Tax Reform Immediately Comm'n.,* 616 F.2d 45, 51 (2d Cir.1980) (citing *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937)). The rationale behind the requirement of ripeness is:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories, 387 U.S. at 148-49, 87 S.Ct. at 1515. *See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 200-01, 103 S.Ct. 1713, 1720-21, 75 L.Ed.2d 752 (1983); *In re Drexel Burnham Lambert Group, Inc.,* 995 F.2d 1138, 1146 (2d Cir.1993). As the Court of Appeals put it, ripeness "turns on whether there are future events so contingent in nature that there is no certainty they will ever occur." *In re Drexel Burnham Lambert Group, Inc.* 995 F2d at 1146; *see also Amsat Cable v. Cablevision of Conn.,* 6 F.3d 867, 872 (2d Cir.1993).

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various materials outside the pleadings submitted by the parties; this motion is properly considered as a motion to dismiss.

[6, 7] In determining whether an issue is properly considered ripe for adjudication, courts are to conduct a two-pronged inquiry. First, a court must "evaluate ... the fitness of the issues for judicial decision." *Abbott Laboratories,* 387 U.S. at 149, 87 S.Ct. at 1515; *Amsat Cable;* 6 F.3d at 872; *In re Drexel Burnham Lambert Group, Inc.,* 995 F.2d at 1146. In determining whether issues are fit for review, a court must look to "whether the agency action is 'final' " and "whether the issue is purely legal or whether 'consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations.' " *In re Combustion Equip. Assocs., Inc.,* 838 F.2d 35, 37-38 (2d Cir.1988) (quoting *Gardner v. Toilet Goods Assoc.,* 387 U.S. 167, 171, 87 S.Ct. 1526, 1528, 18 L.Ed.2d 704 (1967)). The second factor a court must look to in determining whether an issue is ripe is "the hardship to the parties of withholding court consideration." *Abbott Laboratories,* 387 U.S. at 149, 87 S.Ct. at 1515; *Amsat Cable,* 6 F.3d at 872; *In re Drexel Burnham Lambert Group, Inc.,* 995 F.2d at 1146.

A. *Liberty's Claims*

1. *First Amendment*

In its first claim for relief, Liberty (as well as Sixty Sutton and Veerman) challenge certain provisions of the Cable Act, in particular, 47 U.S.C. § 522(7), which defines Liberty's Non-Common System as a "cable system," and 47 U.S.C. § 541(b), which imposes the franchising requirement on cable systems. (Second Amd.Compl. ¶¶ 71-75). Plaintiffs claim that the imposition of a franchise requirement on Liberty's Non-Common Systems, including the Non-Common System at Sixty Sutton, "prevents, burdens, violates and interferes with Plaintiff's [sic] rights to engage in protected speech activity on private property in violation of the First Amendment to the United States Constitution." (Second Amd.Compl. ¶ 74). Plaintiffs assert that these two provisions are invalid both facially and as applied to the NonCommon

Systems which do not utilize public property or rights of way. (Second Amd. Compl. ¶ 75).

[8] The defendants have moved to dismiss plaintiffs' challenge to the Cable Act as unripe. The defendants rely heavily on *Beach I,* 959 F.2d 975, and argue that no meaningful distinction can be drawn between *Beach I* and the instant case.

In *Beach I,* the petitioners were SMATV companies that brought a facial challenge to the Cable Act's requirement, as interpreted by the Federal Communications Commission (the "FCC"), that "external, quasi-private" SMATV facilities be franchised. *Id.* at 98. The Court of Appeals for the District of Columbia Circuit explained that this type o facility was "a SMATV facility with wires or other closed transmission paths interconnecting separately-owned, controlled and managed multiple-unit dwellings, without those wires using public rights-of-way," *id.,* a definition which exactly describes Liberty's Non-Common System. The petitioners argued that the FCC incorrectly interpreted the definition of "cable system" to cover external, quasi-private SMATV, and that this definition violated their First Amendment and Equal Protection rights, by requiring them to obtain local franchises. *Id.*

In considering whether plaintiffs' claims were ripe, the Court of Appeals noted that the obligations imposed by the Cable Act were not "fully defined" and thus were impossible to evaluate. *Id.* at 983. It was because of this uncertainty about the nature of the duty that a local franchising system might impose and because "the justification for that duty will depend on local facts" that the Court held that petitioners' First Amendment challenge was not yet ripe. *Id.* at 984. As the Court put it:

> We cannot find the statute unconstitutional on its face because we do not know whether conditions in any given locality will justify a burden on petitioners' speech, nor do we know what kind of burden will need to be justified, nor the appropriate First

> Amendment standard. Thus, we cannot assess any claim of First Amendment infringement absent an as-applied challenge to some specific franchising requirement.

Id. at 976.

In reaching this conclusion, the Court applied the twofold inquiry articulated in *Abbott Laboratories,* 387 U.S. at 136, 87 S.Ct. at 1507. With respect to the "fitness" inquiry, the Court explained that judicial review of a First Amendment issue is "likely to stand on a much surer footing in the context of a specific application of [the FCC's Cable Definition Rule] than could be the case in the framework of the generalized challenge made here." *Beach I,* 959 F.2d at 984 (citing *Toilet Goods Ass'n v. Gardner,* 387 U.S. 158, 164, 87 S.Ct. 1520, 1524, 18 L.Ed.2d 697 (1967)). Consequently, the Court ruled, it was beneficial to postpone its review of petitioners' facial challenge until there was an as-applied challenge. *Id.* As the Court explained:

> Different regimes will impose different burdens, which may or may not be justifiable under the First Amendment. Moreover, the judicial standard for evaluating the justification will vary with the regime.... A particular local franchising system may impose only an "incidental" burden on the speech of SMATV operators . . . [or] may impose "direct" burdens that require stricter First Amendment scrutiny.

Id. (citations omitted). In addition, the Court noted that a "court reviewing an as-applied challenge will have specific information about the local conditions that might justify SMATV franchising." *Id.*

The second prong of the *Abbott Laboratories* test is, of course, "hardship to the parties of withholding review." *Id.* at 985. The *Beach I* Court explained that:

> "The paradigmatic hardship situation is where a petitioner is put to the choice between incurring

> substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for noncompliance."

959 F.2d at 985 (quoting *Natural Resources Defense Council E.P.A.*, 859 F.2d 156, 166 (D.C.Cir.1988)). Applying this standard to the situation in *Beach I*, the Court noted first that if the petitioners did not comply with the challenged regulations, the petitioners might face civil, or even criminal, penalties. *Id.* The Court then discussed, however, that it was "unclear" whether the petitioners would incur "substantial" costs by complying with the statute and the local franchising scheme. *Id.* In addition, the Court also noted that the choice between compliance and the risk of enforcement could be avoided by bringing an "anticipatory, as-applied challenge," *id*, which I take to mean a challenge to a particular known burden, as opposed to an attack on the facial validity of the statute.[12]

a. *Fitness for Judicial Decision*

The *Beach I* analysis addresses a situation virtually identical to the instant action. With respect to fitness for judicial review, the *Beach I* Court's analysis is exactly on point. Liberty has not yet applied for a franchise from DOITT, and neither the NYSCC nor DOITT has taken any final action with respect to Liberty; in fact, perhaps it is more accurate to say that these agencies have just begun to address Liberty.[13]

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[12] This interpretation is supported by the Court's earlier comment that it could not "assess any claim of First Amendment infringement absent an as-applied challenge *to some specific franchising requirement.*" *Id.* at 976 (emphasis added).

[13] By means of comparison, it is instructive to consider *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), *appealed after remand*, 13 F.3d 1327 (9th Cir.), *cert. denied*, —*U.S.*—, 114 S.Ct. 2738, 129 L.Ed.2d 859 (1994). In *Preferred Communications*, a cable company sued the City of Los Angeles and the Department of Water and Power ("DWP") alleging violation of its rights under the First and Fourteenth Amendment and under §§ 1 and 2 of the Sherman Act by the City's refusal to grant it a

(Footnote continued)

Also as in *Beach I,* Liberty cannot identify what burdens the franchising scheme might impose after weighing, *inter alia,* Liberty's non-traditional method of transmission and the technical limitations attendant thereto.[14] Many of the burdens

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cable television franchise and by the DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. *Id* at 490, 106 S.Ct. at 2035. The Court of Appeals for the Ninth Circuit affirmed the dismissal of the antitrust claims, but reversed the dismissal of the First Amendment Claim. *Id.*. at 491, 106 S.Ct. at 2036. The Supreme Court agreed that the First Amendment claim should not have been dismissed, but was "unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely." *Id.* at 494, 106 S.Ct. at 2037. Thus, even in *Preferred Communications,* where final agency action had been taken, *i.e.,* the City had refused to grant a cable franchise, the Supreme Court found the legal questions raised were not appropriately addressed at that time.

On remand, the Ninth Circuit was unwilling to adjudicate the cable company's First Amendment challenges to the City's franchising scheme until the City issued another request for proposals and the cable company was given the opportunity to apply and compete for a franchise. 13 F.3d 1327, 1332-33 (9th Cir.1994). In that way, it could be determined whether the cable company was "ready, willing and able" to operate a cable system, whether it had the appropriate qualifications, and what the terms of the franchise might be. *Id.* The Court explained that:

> Since there are so many ways we might well avoid having to confront these difficult constitutional issues, it would be precipitous of us to try to reach them at this time. Were we to try, we would have to "decide the legal questions posed by the parties without a more thoroughly developed record ...," something the Supreme Court refused to do when reviewing our last opinion. If we failed to follow the Court's example, "we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta."

Id. at 1333 (citations omitted).

[14] I note that Martin Schwartz, counsel for Time Warner, pointed out on March 1, 1995 at argument that the burdens of a franchise initially proposed by DOITT tend to differ markedly from the eventual franchise which results from extended negotiations between DOITT and the cable operator. As Mr. Schwartz explained:

(Footnote continued)

are permissive rather than mandatory *(e.g.,* 47 U.S.C. § 545(a)(1) which allows cable operators to displace local franchising requirements relating to educational equipment obligations upon a demonstration of commercial impracticality), are graduated according to the number of channels delivered by the cable operator *(e.g.,* 47 U.S.C. § 534(b)(1) which requires a cable system with 12 or fewer channels to carry at least three local commercial stations and a cable system with more than 12 channels to carry local commercial stations on up to one-third of its channels; 9 NYCRR, part 595.4(b) which provides similarly graduated requirements with respect to public, educational or governmental ("PEG") access channels) or set limits that benefit prospective cable operators *(e.g.,* 47 U.S.C. § 542(b) which provides a 5% cap on franchise fees but which does not prevent a municipality from accepting less). There is no way to know at this time what the ultimate mix of burdens might

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> I can tell you that the end product usually looks a lot different from the city's initial proposal. So that goes to the question as to whether this rule making which invites comments is going to be similar or identical to what ultimately eventuates. I would suggest that there is a great deal to be determined in terms of what the terms would be for several reasons .

(Transcript of oral argument held March 1, 1995 and March 3, 1995 ("Tr.") at 47). Lewis Finkelman, counsel for the City, also explained that:

> [T]hese are proposed rules.... Liberty is free to comment to point out why some of these conditions are not appropriate to a system like theirs. That's the whole point of this proposed rule making process, so the city can get input We have never given a franchise like this. There are many issues that obviously are going to be troublesome that we want comments from interested parties on and are willing to hear them in order to determine what the provisions should be of the franchise agreement.
>
> It certainly i not a given [that the terms and conditions of the franchise ially authorized will be the same as those in the New Rulemaking]. And this is why, with respect to this process, it is certainly not a ripe challenge at this point.

(Tr. at 35-36).

be. Also as in *Beach I, 959* F.2d at 984, because we do not know the precise nature of the burdens imposed, it cannot be said what the appropriate level of scrutiny might be with which to evaluate plaintiffs' First Amendment' challenge.[15] The factual record has simply not reached a stage of development at which these difficult questions are appropriately addressed.[16]

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[15] For example, in *Turner Broadcasting Sys. v. Federal Communications Comm'n, --U.S.—* 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), the Supreme Court decided that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." On the other hand, a less rigorous standard is applicable to broadcast medium due to the "unique physical limitations of the broadcast medium." *Id.* at—, 114 S.Ct. at 2456; *see, e.g., Red Lion Broadcasting Co. v. Federal Communications Comm'n,* 395 U.S. 367, 388-90, 89 S.Ct. 1794, 1805-07, 23 L.Ed.2d 371 (1969); *New York Citizens Comm. on Cable TV v. Manhattan Cable TV*, 651 F.Supp. 802, 817-18 (S.D.N.Y.1986) (explaining that "differences among the various modes of communication justify differences in the First Amendment standards applied to them" and declining to decide what standard review should apply to cable television "without more facts about cable television").

[16] I note that several of the items which Veerman and Sixty Sutton contend require discovery so "that the factual record [can] be sufficiently developed to allow meaningful appellate review" (MacNaughton March 8, 1995 letter, p. 1) are exactly the issues that one would expect a franchising authority to consider during the franchising process, *e.g.:*

> The specific policies and practices of the "must-carry stations" that would be implemented if Liberty were required to have a franchise. This would establish the specific number of channels that Jack A. Veerman and Sixty Sutton Corp. will lose if the franchise requirement is imposed on Liberty.
>
> * * * * * * *
>
> The specific construction costs for building a cable television system in Community District 6 where the Sutton Building is located.
>
> * * * * * * *

(Footnote continued)

b. *Hardship of Withholding Court Consideration*

Turning to the question of the hardship to the parties, as was true of the petitioners in *Beach I*, it cannot be said on the facts currently in the record that any particular hardship will befall the plaintiffs if judicial decision-making is withheld for now. First, in the instant case, it is as yet unknown what the "costs of compliance," 959 F.2d at 985, with the local franchising scheme might be–given that the franchising process is on-going (*See, e.g.*, Second Bronson Aff. ¶¶ 1-3, Ex. A). I do note, however, that the time periods set for the initial steps toward a franchise are relatively short and, therefore, that any delay on account of the franchising process may well be brief. *Id.* Second, the analogy to the risk of "serious penalties", *id.*, is, presumably, the threat that Liberty's cable service will be interrupted.[17] However, whether the defendants will exercise their regulatory authority in such a way as to impinge upon the constitutional rights of the plaintiffs simply cannot be ascertained as yet.[18]

> The specific burdens of complying with the mandatory federal standards for . . . rate regulation pursuant to 47 U.S.C. § 593.
>
> * * * * * * *
>
> The Specific burdens of complying with mandatory state standards for . . . PEG channels pursuant to 9 N.Y.C.R.R. § 595.4.

Letter of W. James MacNaughton, Esq., dated March 8, 1995.

[17] As W. James MacNaughton, counsel for Sixty Sutton and Veerman, colorfully put it: "the sword of [D]amocles and an order to show cause ... [are] about to chop those wires." (Tr. at 109).

[18] The State has pointed out that the outcome of the administrative proceedings commenced–but temporarily halted–against Liberty should not be presumed:

> In the administrative proceeding before the [NYSCC], Liberty will be provided a complete and full opportunity to present

(Footnote continued)

In addition, to the extent that any hardship might accrue to Liberty because of interruption to the Non-Common Systems it currently services or is ready to service, that hardship is of Liberty's own making. Liberty constructed its Non-Common Systems, including the system serving Sixty Sutton, from January 1993 to August 1994. (Price Aff. ¶ 12). Liberty did not, however, express any interest in obtaining a franchise from the City until October 28, 1994, several months after the NYSCC issued its Order to Show Cause. (Grow Aff. ¶¶ 7, 10, Ex. 8).

Liberty proffers a variety of reasons for its delay. First, Liberty asserts that it constructed its Non-Common Systems in reliance on alleged NYSCC and DOITT "policy" that a cable system which did not use City property or public rights-of-way did not qualify for and was not required to obtain a franchise. (Price Aff. ¶ 12). Liberty points to a April 27, 1992 letter from DOITT advising the Russian American Broadcasting Company ("RABC") that it did not need a franchise from the City to provide service because there was no proposed use of the inalienable property of the City. (Price Aff. ¶¶ 12-13; First Amd.Compl., Ex. C). Liberty also claims that its President, Mr. Price, met with William Squadron, then DOITT's Commissioner, and Christopher Collins, then General Counsel, in mid-March 1992. (Price Aff. ¶ 14). Mr.

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evidence to support the exempt status of any locations that are commonly owned, controlled or managed. Contrary to Liberty's claims in its Amended Complaint at Paragraphs 65-66, its service to subscribers will not necessarily be terminated. It is also not true that the [NYSCC] will necessarily order Liberty to sever connecting cable, or pay fines or sanctions. Merely because the Standstill Order has been issued does not mean that the commission has issued a final determination in this matter. In at least one prior case in which the [NYSCC] issued an Order to Show Cause against a system that served a condominium development, a Cease and Desist Order was not issued for one year. Even then the [NYSCC] allowed the operator to apply for a franchise, which it did. The franchise was granted, and *there was no interruption in service.*

(Grow Aff. ¶ 32 (emphasis added).

Price claims that Mr. Squadron and Mr. Collins stated to him that Liberty did not need a franchise so long as no City property or rights-of-way were used. (Price Aff. ¶ 14). However, Both Mr. Squadron and Mr. Collins have entirely different recollections of this meeting. They state that the issue of Liberty's operating Non-Common Systems was not discussed at the meeting, and that they both understood Liberty to employ service via microwave transmission, not via wire. (Collins Aff. ¶¶ 3-4;[19] Squadron Aff. ¶ 3).[20] Each also states unequivocally that Liberty never asked him or anyone else whether a franchise was required by the City. (Collins Aff ¶ 5; Squadron Aff. ¶ 4). Given that the accounts of what happened at this meeting are flatly contradictory, I do not rely on either plaintiffs' or defendants' account of this meeting.

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[19] Reference is to the Affidavit of Christopher Collins executed January 30, 1995. Collins states that at the meeting with Mr. Price:

> Mr. Price described to us [Collins and Squadron] a system which contemplated service to multiple buildings via microwave transmissions, not via wire. Since my understanding at that time was that Liberty's system exclusively employed microwave transmission between buildings, I can unequivocally aver that I did not make the statement Mr. Price has attributed to me.

(Collins Aff. ¶ 4).

[20] Reference is to the Affidavit of William F. Squadron executed January 30, 1995. Squadron states in part that:

> The installation which we inspected during that meeting was a single satellite reception antenna delivering cable television serice to the residents of a single building, and Liberty's system, as described to us by Mr. Price, contemplated service to multiple buildings via microwave tansmission, not via wire. I could not have stated that a "Non-Common System" operated by Liberty would not require a franchise because my understanding, then, and throughout my tenure, was that Liberty's system exclusively employed microwave transmission between buildings

(Squadron Aff. ¶ 3).

But, assuming *arguendo* that first, Liberty relied on the letter to the RABC, second, that such reliance was somehow reasonable,[21] and third, that government employees can waive the requirements imposed by law,[22] this still does not explain

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[21] According to the NYSCC, RABC provides services in a manner quite different from the way in which Liberty does.

> The original proposal by RABC was to provide a single channel of Russian language programming, which had been initially made available via transmission over-the-air and which the company also wished to provide through wire or coaxial cable.
>
> In contrast to the service provided by RABC, the service Liberty seeks to provide is a multi-channel service that includes the capacity to distribute as many as 72 channels. This service would be provided by wire or coaxial cable.... RABC's service is thus substantially different from the sort of service that Liberty seeks to provide.

(Grow Aff. ¶¶ 18-19.).

[22] Under New York law, Liberty has no legal basis for relying on the RABC letter. *See, e.g. Genesco Entertainment v. Koch*, 593 F.Supp. 743, 749 (S.D.N.Y.1984) (stating that "the New York courts do not generally follow the doctrine of apparent authority in cases involving municipal defendants"). The District Court noted that, "New York places the burden of determining the scope of a municipal officer's authority upon those who deal with municipal government." *Id.* The Court explained that:

> Where the Legislature provides that valid contracts may be made only by specified officers or boards and in specified manner, no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city. In similar case [sic] this court has given emphatic warnings that equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions.

Id. at 750 (quoting *Seif v. City of Long Beach*, 286 N.Y. 382, 387-88, 36 N.E.2d 630, 632 (1941)). *See also Restatement Second of* Agency § 167 comment c (1958).

why Liberty failed to approach DOITT and ask for a franchise. In addition, since January 1993, Liberty by its own admission has operated "cable systems" and is a "cable operator" required by the Cable Act to have franchise. (Jacobs Aff. ¶ 7[23] First Amd.Compl. ¶¶30-31). Furthermore, on June 1, 1993, the Supreme Court held in *Beach III* that SMATV operators which interconnect separately owned, controlled and managed buildings with cable were subject to the Cable Act, even if such cable is solely on private property.[24] Liberty clearly knew of this development in the law.[25] However, as noted above, Liberty did not contact the City with respect to a franchise until October 1994, after the NYSCC issued its Order to Show Cause, and even then, it was in a single-sentence letter stating only that Liberty was "interested in applying for a cable television franchise pursuant to the Resolution No. 1639 and applicable federal law." (Grow Aff. ¶¶ 7, 10, Ex. 8). Particularly in light of the *Beach III* decision, there is no satisfactory explanation as to

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[23] Reference is to the Affidavit of Robert S. Jacobs executed on January 13, 1995.

[24] The issue facing the Supreme Court was whether there was a rational basis that justified the distinction between cable facilities serving separately owned and managed buildings and those serving one or more buildings under common ownership or management. *Id.* at __, 113 S.Ct. at 2099. The Court concluded that the common-ownership distinction was constitutional. *Id.* at __, 113 S.Ct. at 2102. The Court noted that the Court of Appeals "evidently believed that the crossing or use of a public right-of-way is the only conceivable basis upon which Congress could rationally require local franchising of SMATV systems." *id.* at __, 113 S.Ct. at 2104, but the Supreme Court held, to the contrary, that "there are plausible rationales unrelated to the use of public rights-of-way for regulating cable facilities serving separately owned and managed buildings." *Id.*

[25] In fact, Liberty wrote to the FCC on April 7, 1992 urging the FCC in no uncertain terms to defend the definition of "cable system" against the constitutional challenges brought by the *Beach* petitioners. (Jacobs Aff. ¶9; Ex. T)

why Liberty did not request a franchise promptly after June 1, 1993.[26]

Finally, any claim by Liberty that it will suffer hardship during the pendency of the franchising process is undercut by its requests for a thirty-day extension of time in which to answer the Order to Show Cause (Grow Aff. ¶ 8, Ex. 4) and later a one-hundred-eighty day adjournment during which it agreed not to construct any new Non-Common Systems (Grow Aff. ¶ 10, Ex. 6).

On the other hand, a substantial hardship will be imposed on NYSCC and DOITT if plaintiffs are permitted to proceed in this Court because those agencies' ongoing proceedings on this very issue will be interfered with. Since the ripeness doctrine is intended not only to protect courts from premature adjudication, but also to "protect the Agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," *Abbott Laboratories*, 387 U.S. at 148-

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[26] *See, e.g., Conn. State Federation of Teachers v. Board of Educ. Members*, 538 F.2d 471 (2d Cir. 1976). In that case, plaintiffs were teachers' local unions who alleged a deprivation of their First and Fourteenth Amendment rights. *Id.* at 475. Plaintiffs complained that, among other things, "as a matter of school board policy", the majority teachers' union was given access to school facilities for its meetings, but that other groups had to "apply" to a designated official for permission to use the facilities. The Court noted that the plaintiffs had failed to allege that the local had ever requested permission to use the school facilities for a meeting; that such a request was denied; or, that if a request had been denied, it was denied for a constitutionally impermissible reason. *Id.* The Court went on to say that:

> If the [plaintiffs' local] is given permission freely to hold it meetings in school facilities (and we will not assume, absent specific allegations, that the ... defendants engage in unconstitutional conduct in this respect) the "difficulty" involved in requesting this permission from the designated official hardly can be considered an infringement on the First Amendment rights of [the local's] members.

Id.

149, 87 S.Ct. at 1515, this hardship must be weighed heavily. *See also Payne Enters. v. United States,* 837 F.2d 486, 493 (D.C.Cir.1988) ("under the ripeness doctrine, the hardship prong of the *Abbott Laboratories* test is not an independent requirement divorced from the consideration of the institutional interests of the court and agency").

On balance, I find that it would be inappropriate to exercise judicial decision-making power at this time on these issues. *See, e.g. Daley v. Weinberger*, 400 F.Supp. 1288, 1291 (E.D.N.Y.1975) (holding that physician's claims for declaratory and injunctive relief to prevent the FDA from inspecting her office not yet ripe where there was "no final agency action whose legality the court may pass upon" and noting that the "court is reluctant to anticipate what future action, if any, FDA may decide to take"), *aff'd*, 536 F.2d 519 (2d Cir.1976), *cert. denied*, 430 U.S. 930, 97 S.Ct. 1548, 51 L.Ed.2d 773 (1977).[27]

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[27] The situation facing the plaintiffs in the instant case can thus be distinguished from, *e.g.*, that facing the plaintiff in *Amico v. New Castle County*, 553 F.Supp. 738 (D.Del.1982), *aff'd*, 770 F.2d 1066 (3d Cir.1985). There, plaintiff, who sought to open an adult entertainment center, contended that a county ordinance restricting where such facilities could be established impermissibly burdened his First Admendment rights, and the defendant moved to dismiss based, in part, upon ripeness. *Id.* at 739. The defendant argued that the case was not yet ripe because the plaintiff had not provided the county with information requested by the county without which, the county claimed, it could not make a final determination of plaintiff's application for his center. *Id.* at 742. Without that final determination, the county argued, the case was not ripe. *Id.* The Court rejected this argument. First, the Court pointed out that the county had not been able to specify what information it sought. *Id.* at 742-43. Second, and more importantly, the Court stated that it was "clear" that the county was not going to grant the plaintiff the necessary certificate of compliance. *Id.* at 743. This argument is inapplicable to the instant case, where it simply cannot be said that the City is going to deny Liberty a cable franchise.

Triple G Landfills v. Board of Comm'rs of Fountain County, 977 F.2d 287 (7th Cir.1992) is inapplicable for similar reasons. In that case, plaintiff sought a declaration that a county ordinance regulating the

(Footnote continued)

Despite Liberty's April 7, 1992 submission to the FCC agreeing that the "the [Beach] Petitioners' claims of oppressive regulation are not yet ripe for decision" (Jacobs Aff., Ex. T at 2), plaintiffs contend that *Beach I* is inapposite. First, Liberty points to the Standstill Order, which forecloses Liberty from establishing Non-Commons Systems service to a number of buildings to which Liberty would otherwise commence the process of establishing cable service. Liberty claims that at that moment when Liberty is foreclosed from hooking up these other buildings, Liberty is harmed concretely enough to demonstrate that the action is ripe. However, Liberty's situation is in this regard no different from the situation facing the *Beach* petitioners. In *Beach I*, the Court noted that "[p]etitioners have standing because they currently operate external, quasi-private SMATV facilities or have concrete plans to operate such facilities." 959 F.2d at 980 n. 6. Thus, the fact that Liberty is providing cable service to subscribers and may have potential subscribers does not distinguish the ripeness of Liberty's claims from those of the *Beach* petitioners who also operated or had plans to operate SMATV facilities identical to Liberty's.

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development of landfills was impermissible under federal and state law. *Id.* at 288. The County argued that the case was not ripe because Triple G had not yet applied for a state permit, the implication of which was that Triple G could not yet apply for a county permit, and so Triple G did not face an immediate threat of enforcement. *Id.* at 290. The Court found, however, that the case was ripe for reasons similar to those in *Amico*, namely, that the outcome was, in effect, predetermined:

> Given the virtually preclusive effect of the ordinance at the county level, there would be no point in requiring Triple G to engage in a state permitting process—a process that the County itself admits is "withering and expensive." ... The ripeness doctrine requires a live, focused case of real consequence to the parties. It does not require Triple G to jump through a series of hoops, the last of which it is certain to find obstructed by a brick wall.

Id. at 290-91. It cannot be said here that Liberty is certain to meet a brick wall in the franchising process. In addition, the *Triple G* Court noted that the case involved "purely legal" issues, *id.* at 289, whereas the instant case is fact-intensive.

Second, Liberty attempts to distinguish *Beach* on the ground that the burdens which Liberty allegedly faces are more concretely known here. However, with respect to the burdens which might be imposed by the franchise, Liberty's situation differs little from that of the petitioners in *Beach*. As the *Beach I* Court put it:

> The Cable Act creates a franchise requirement, but gives localities broad discretion to determine the substance and process of franchising. The Act permits but does not require exclusive franchising.... Similarly, the Act does not generally require that localities impose special duties on franchisees, but simply permits localities to regulate cable rates, set aside public channels, or levy a franchise fee. And, in general, the statute gives only minimum specifications for the franchising procedures. In short, a locality could adopt a summary process for franchising every external, quasi-private SMATV facility, and local SMATV operators could discharge their ... obligation by complying with this process. Such a franchising regime would pose very different First Amendment problems than a costly, exclusive-franchising system.

Id. at 983-94 (citations omitted). It is because of the degree of discretion given to the local franchising authorities that it cannot be said with assurance what the burdens of a franchise awarded by DOITT might be for Liberty. In fact, Liberty itself recognizes that all of the burdens it may face are not yet known. (Liberty's Reply Mem. of Law in Supp. of Pls. Mot. for a Prelim. Inj. at 32; Tr. at 58).

Liberty contends, however, that its dispute is ripe with respect to a number of "mandatory" burdens, that is, burdens which Liberty says are required to be imposed on it directly

through federal regulation and which thus are now known. (Third Price Aff. ¶ 8).[28] As Liberty explained,

> If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, these obligations will include certain channel allocation requirements. Among these mandatory channel allocation requirements are "must-carry", *see*, 47 U.S.C. §§ 534 and 535, "leased access", *see*, 47 U.S.C. § 532, and public, educational and government ("PEG") channels, *see*, 47 U.S.C. § 531, Executive Law § 829(3) and 9 N.Y.C.R.R. § 595.

(Third Price Aff ¶ 8). However, these requirements are the same as those that faced the petitioners in *Beach*. The *Beach* petitioners' "external quasi-private SMATV" is identical to Liberty's Non-Common System, and they faced precisely the same regulatory framework.

In addition, on the face of its pleading, Liberty is challenging the constitutionality of §§ 522(7) and 541(b),[29]

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[28] Reference is made to the Affidavit of Peter O. Price executed on March 3, 1995.

[29] For example, in Liberty's first claim for relief, Liberty challenges the constitutionality of 47 U.S.C. §§ 522(7) and 541(b). (Second Amd. Compl. ¶¶ 71-75). Read together, these two sections impose the local franchising requirement, not mandatory federal burdens. The gravamen of the second and third claims is that Liberty was prohibited to operate its Non-Common Systems without a franchise, but DOITT did not provide for issuance of a franchise to this type of system. (Second Amd. Compl. ¶¶ 78, 81). The fourth, fifth, and sixth claims assert equal protection claims. (Second Amd. Compl. ¶¶ 84, 88). The sixth claim also asserts a Due Process claim. (Second Amd. Compl. ¶ 90). There is nothing in the rest of the claims asserted by Liberty even remotely susceptible of being interpreted as a challenge to mandatory federal burdens. (Second Amd.Compl. ¶¶ 92, 96, 99, 101, 104, 106). At no point in the pleadings does Liberty enumerate the particular burdens directly imposed by the Cable Act that it opposes. I also note that Liberty did not name the United States as a defendant.

that is, the definition of a cable system and the franchising requirement imposed on such cable systems. With the franchising requirement, however, comes not only burdens but benefits, for example, the five percent cap on franchise fees contained in 47 U.S.C. § 542(b). Because the Second Amended Complaint is directed to the entire franchising requirement, such benefits are also subject to plaintiffs' challenge. The challenge in the Second Amended Complaint is *not* limited to a challenge of one or more of the mandatory burdens imposed,[30] and, indeed, certain such challenges could not be brought in this court.[31] Thus, plaintiffs' efforts to distinguish themselves from *Beach* by this method are unavailing.[32]

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[30] Liberty's challenge is different from a facial constitutional challenge to a particular aspect of the federal regulations. For example, the cable industry has challenged eleven provisions of the Cable Television Consumer Protection and Competition Act of 1992 and to two provisions of the Cable Communications Policy Act of 1984. *See, Daniels Cablevision v. United States*, 835 F.Supp. 1,3 n. 1 (D.C.Cir.1993), *appeal docketed subnom. Time Warner Entertainment Co. v. United States*, D.C.Cir., No. 93-5349. In that litigation, the plaintiffs challenged various provisions individually, including rate regulation; must-carry; public access channels; limitations on ownership, control and utilization; vertically integrated programmers; public, educational and government access; and leased access. *Id.*

[31] For example, the constitutionality of the "must-carry" requirements set forth in 47 U.S.C. §§ 534 and 535 may only be heard by a district court of three judges convened pursuant to 28 U.S.C. § 2284. 47 U.S.C. 555(c)(1). I also note that the Supreme Court has addressed the constitutionality of the must-carry rules in *Turner Broadcasting Syst v. F.C.C.*, — U.S. —, — , —, 114 S.Ct. 2445, 2469, 2472, 129 L.Ed.2d 497 (analyzing the must-carry rules under intermediate-level scrutiny and remanding in order to develop a more thorough factual record), *reh'g denied*, —, U.S. — , 115 S.Ct. 30, 129 L.Ed.2d 927 (1994).

[32] I also note the comment of the *Beach* court at 985: "Moreover, it is possible that petitioners might avoid the Hobson's choice between compliance and the risk of enforcement by bringing an anticipatory, as-applied challenge." The implication of this language is that a challenge more likely to be found ripe for adjudication would be a challenge to a

(Footnote continued)

In short, defendants' motion to dismiss is granted with respect to Liberty's first cause of action.

2. *Due Process*

In its third cause of action, Liberty alleges that:

> Defendants' conduct which, *inter alia*, includes the prohibition of Liberty's operation of the Non-Common Systems without a franchise, and failure to provide the terms and conditions for issuance of a franchise to cable systems which do not use public property or rights-of-way, prevents burdens, violates and interferes with Liberty's rights to engage in protected speech activity on private property in violation of the First Amendment.

(Second Amd.Compl. ¶ 810. The gravamen of Liberty's claim was that Federal and State regulations required Liberty to obtain a franchise, but that DOITT did not provide franchises for cable systems such as Liberty's. This dilemma apparently constitutes the facts upon which the plaintiff's rely on their sixth cause of action where they assert that "[d]efendants' conduct constitutes a denial of Plaintiffs' right to due process and equal protection in violation of the Fourteenth Amendment to the United States Constitution" (Second Amd.Compl. ¶ 90), and their eighth cause of action where they complain of Resolution 1639 as clearly inapplicable (ignoring Executive Law § 819(2)), vague and investing the City with boundless discretion—all in violation of plaintiffs' due process rights (Second Amd.Compl. ¶¶ 94-96).

The dilemma that Liberty faced when it filed its original complaint—of being required to obtain a license to operate yet having nowhere to obtain one—is not the current situation; the fact upon which plaintiffs relied in pleading these claims originally have changed.

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particular burden which is going to be imposed, and not merely a broad attack upon the Cable Act itself.

It is undisputed that on February 24, 1995, DOITT published a notice of rulemaking regarding solicitations for franchises for the provision of cable service such as Liberty's, *i.e.*, cable service which does not use the inalienable property of the City. (Second Bronston Aff. ¶¶ 1-2, Ex. A). According to DOITT, the rulemaking process is proceeding in accordance with the City Administrative Procedure Act. (Second Bronston Aff. ¶ 2). As part of this process, the public written comment period for the proposed rules is due to close on April 3, 1995, and a public hearing will be held on April 4, 1995. (Second Bronston Aff. ¶ 3, Ex. A). The proposed rules also set forth deadlines for the submission of franchise applications, DOITT's review of such applications, and the preparation of franchise agreements. (Second Bronston Aff. ¶ 3, Ex. 1).

After DOITT certifies that an application is complete, it has sixty days to send a proposed franchise, which shall include "the terms of the applicant's certified application, the requirements of City Council Resolution 1639 and such other reasonable terms and conditions DOITT shall determine are appropriate to protect and advance the public interest." (Second Bronston Aff., Ex. A, § 6-03). Ultimately, in order for a franchise to be effective, it must be approved by the Franchise and Concession Review Committee as well as the Mayor. *Id.* There are no time limits on these particular steps in the franchising process. *Id.*

The intervening change in the factual circumstances necessarily altered the focus of Liberty's argument. As Lloyd Constantine, counsel for Liberty, stated at oral argument on March 1, 1994:

> "the day before yesterday, ... there was no process. And now we have a process. And the process if fraught with and pock marked with boundless discretion."

(Tr. 45). At oral argument, Liberty complained that the RFP allowed the City unfettered discretion, both substantively and temporally, in how it grants franchises and that Liberty could

not wait as long as the City's process would require.[33] *See, e.g.* Tr. at 10-11, 45-46).

[9] due to this intervening change in circumstances, it is apparent that Liberty due process claims are not ripe. Unlike the situation when the action was filed, a procedure is in place through which Liberty can apply for a franchise. It has not done so,; and, of course, it cannot be said at this point how long that process will take or what the substantive outcome will be. rather than ruling in a vacuum on issues that might never arise, considerations of ripeness require that the process be permitted to go forward, both because certain issues might never arise and because a more fully developed factual record is required for a reasoned adjudication of Liberty's claims. In short, the franchising process is ongoing; there has not been any final agency action taken. *See Weissman v. Fruchtman*, 700 F.Supp. 746, 755-57 (S.D.N.Y.1988) (explaining that plaintiffs' procedural due process claims were premature where city agency had not yet made a "sufficiently final decision").

In addition, as the City pointed out at argument, the Cable Act requires DOITT to act reasonably. 47 U.S.C. § 541(a)(1).[34] If DOITT acts unreasonably at some point in the

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[33] This claim is raised in the eighth cause of action.

> With the exception of its clear inapplicablity to the Non-Common Systems, Resolution 1639 is vague, and vests the City and DOITT . . . . with normless and unfettered discretion to grant or deny cable television franchises. Resolution 1639 purports to grant the City and DOITT normless and unfettered discretion to prevent and burden protected speech activity and is therefore facially invalid as violative of the due process clause of the Fourteenth Amendment.

(Second Amd.Compl. ¶ 96).

[34] This section provides that:

> A franchisisng authority may award, in accordance with the provisions of this subchapter, 1 or more franchises withnin its jurisdiction; except that *a franchising authority* may not grant an exclusive franchise and

(Footnote continued)

future, either by unreasonably prolonging the proceedings or by imposing unreasonable burdens, Liberty has ready means to address the situation then on a more fully developed record of actual facts from which it may argue that a due process violation occurred rather than arguing from the possibilities and likelihoods relied on today.

With respect to the question of hardship to the parties of withholding decision, the same analysis applies here as applied to Liberty's First Amendment claim.

Thus, Liberty's Due Process claims are not ripe for adjudication.

B. *Sixty Sutton's and Veerman's Claims*

Plaintiffs Veerman and Sixty Sutton (the "Subscribers") assert, *inter alia*, that the requirements of the Cable Act interfere with their right to engage in protected speech activity on private property in violation of their First Amendment rights (Second Amd.Compl. ¶¶ 75, 78) and that defendants' conduct violates their due process rights (Second Amd.Compl. ¶¶ 90, 96). Defendants have also moved to dismiss these claims on, *inter alia*, the ground that they are not ripe. For the reasons set forth below, that motion is granted with respect to the Subscribers' First Amendment and due process claims.

1. First Amendment Claims

[10] In asserting their various First Amendment claims, the Subscribers urge that they have a First Amendment right to receive information that is separate from Liberty's right to broadcast that information. In support of their position they cite, *inter alia*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 75647, 96 S.Ct.

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may not unreasonably refuse to award an additional competitive franchise.

47 U.S.C. § 541(a)(1) (emphasis added).

1817, 1823, 48 L.Ed.2d 346 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both.... [F]reedom of speech necessarily protects the right to receive.") (citations and internal quotations omitted); *Lamont v Postmaster General of United States,* 381 U.S. 301, 308, 85 S.Ct. 1493, 1497, 14 L.Ed.2d 398 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.") (Brennan, J., concurring); *Westmoreland v. Columbia Broadcasting System, Inc.,* 752 F.2d 16, 22 (2d Cir.1984) ("[T]he public . . . has First Amendment interests that are independent of the First Amendment interests of speakers.") *See also Board of Educ., Island Trees Union Free Schl Dist. No. 26 v. Pico,* 457 U.S. 853, 867, 102 S.Ct. 2799, 2808, 73 L.Ed.2d 435 (1982) (noting that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom"); Sheryl A. Bjork, "Indirect Gag Orders and the Doctrine of Prior Restraint", 44 *U.Miami L.Rev.* 165, 187 (Sept. 1989) (arguing that the right to receive information exists "apart from the right to speak"); Rene L. Todd, "A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants", 88 *Mich. L.Rev.* 1171, 1190-91 (April 1990) (noting that "the [Supreme] Court has given little guidance as to the scope of a right to receive information").

Defendants, on the other hand, argue that the Subscribers' rights are wholly derivative from Liberty's rights and, thus, that the Subscribers do not have any greater First Amendment rights to receive cable programming than Liberty has to transmit it. *See, e.g., Board of Educ., Island Trees Union Free Schl. Dist. No. 26 v. Pico, supra* at 867, 102 S.Ct. at 2808 (stating that the "right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., supra,* 425 U.S. at 757, 96 S.Ct. at 1823 (stating that there is a First Amendment right to receive information and that *"[i]f* there is a right to advertise, there is a reciprocal

right to receive the advertising) (emphasis added); *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir.), *cert. denied*, 488 U.S. 946, 109 S.Ct. 377, 102 L.Ed.2d 365 (1988); *Bicknell v. Vergennes Union High Schl. Bd. of Directors*, 475 F.Supp. 615, 620-21 (D.Vt.1979) (holding that a school board's decision to ban certain books from a high school library did not infringe students' First Amendment rights and explaining that "The right to receive information in the free speech context is merely the reciprocal of the right of the speaker.... The students' right to review those works through the school library, expressed as the Constitutional right to receive information, is no broader [than the rights of works purchased by the school library or retained on the shelves]"), *affd*, 638 F.2d 438 (2d Cir. 1980); George J. Baldasty & Roger A. Simpson, "The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment", 56 *Wash.L.Rev.* 365, 374-75, 393-95 (July 1981) (arguing that the "right to receive information" is "a derivative right appropriately encompassed by the First Amendment").[35]

For example, in *In re Dow Jones & Co.*, 842 F.2d 603, several news agencies appealed a "gag order" directed at prosecutors, defendants and defense counsel (but not the press) which was designed to prohibit all extrajudicial speech relating to the pending "Wedtech" case. The Court of Appeals

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[35] In *League of Women Voters of California v. Federal Communications Comm'n.*, 489 F.Supp. 517 (C.D.Cal.1980), the court did not distinguish broadcasters and recipients of speech with respect to the threshold question of ripeness. Plaintiff there sought declaratory and injunctive relief that 47 U.S.C. § 399(a), forbidding non-commercial broadcast licensees from editorializing, endorsing, or opposing candidates for public office, violated the First Amendment. *Id.* at 518. The plaintiffs included both broadcasters and would-be recipients of speech. *Id.* at 519-520. The non-broadcasters challenged the statute as interfering with their right to receive the free speech of broadcasters. *Id.* at 520. The Court dismissed the case, in part on ripeness grounds. *Id.* at 521. The Court noted that there was "a distinct likelihood" that the FCC would not seek to penalize the broadcaster, and that the hardship to the parties could not yet be determined. *Id.* at 520.

explained that the right of the media to receive speech was derivative of the rights of the trial participants to speak and did not enlarge the would-be speakers' First Amendment rights. As the Court stated:

> [W]hen considering the merits, the press' right to receive speech does not enlarge the rights of those directly subject to the restraining order. Success on the merits for the news agencies is entirely derivative of the rights of the trial participants to speak.

Id. at 608.[36]

[11] Assuming *arguendo* that the Subscribers' First Amendment rights are not derivative of Liberty's, the Subscribers do recognize that the government may regulate speech activity undertaken in the privacy of one's own home to protect third parties from injury. (*E.g.*, Sixty Sutton's and Veerman's Reply Mem. at 3).[37] For example, as the

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[36] Similarly, in *United States v. Simon*, 664 F.Supp. 780 (S.D.N.Y.1987), in which a number of news agencies asked the District Court to vacate an earlier version of the "gag order" at issue in *Dow Jones*, the Court stated that the news agencies' right to receive information was "entirely derivative" of the rights of the speaker. *Id.* at 786. As the Court explained:

> a potential recipient of speech faces a two-step hurdle before he may successfully challenge, on First Amendment grounds, a restraint on the right of others to speak. First, his right to receive speech becomes cognizable only when an individual has indicated a willingness to speak and is being restrained from doing so. *See Virginia State Board*, 425 U.S. at 756, 96 S.Ct. at 1822. Under such circumstances, the potential recipient would have standing to challenge the restraint. Even then, however, the challenge may be defeated if the restraints imposed upon the putative speaker are within the limits permitted by the Constitution. *Thus, the potential recipient's rights are entirely derivative of those of the speaker.*

Id. (emphasis added).

[37] Reference is made to the Reply Memorandum of Plaintiffs Sixty Sutton Corp. and Jack A. Veerman in Support of Motion for a Preliminary Injunction.

Subscribers correctly note, a person may read pornography in the privacy of his or her own home. *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). In *Stanley,* the Supreme Court held that Georgia's asserted interest in preventing the poisoning of the minds of a reader of pornography was clearly insufficient to justify encroaching upon the right to be free from "unwanted governmental intrusions into one's privacy"—a right which is of particularly great significance in the context of one's home. *Id.* at 564-66, 89 S.Ct. at 1247-49. However, this right is not absolute; in *Osborne v. Ohio,* 495 U.S. 103, 111, 110 S.Ct. 1691, 1697, 109 L.Ed.2d 98 (1990), the Supreme Court held that states may proscribe the possession of child pornography. The difference between *Stanley* and *Osborne,* the Court explained, was that the statute challenged in *Osborne* was enacted in order to protect third parties, namely, the victim of child of pornography. *Id.* at 109, 110 S.Ct. at 1696.

Similarly, the Supreme Court has ruled in *City of Ladue v. Gilleo,* ___ *U.S.* ___, ___, 114 S.Ct. 2038, 2041, 2047, 129 L.Ed.2d 36 (1994) that a statute which prevented homeowners from putting signs in their windows was unconstitutional. However, in *Metromedia v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), in which the Court struck down a San Diego ordinance that imposed "substantial prohibitions on the erection of outdoor advertising displays within the city", *id.* at 493, 101 S.Ct. at 2885, the Court stated unequivocally that, "at times First Amendment values must yield to other societal interests." *Id.* at 501, 101 S.Ct. at 2889. The Court explained that in order to evaluate the constitutionality of an ordinance such as this, a court must "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." *Id.* at 502, 101 S.Ct. at 2890. In order to do this, the Court continued, there need be "a particularized inquiry into the nature of the conflicting interests at stake . . . beginning with a precise appraisal of the character of the ordinance as it affects communication." *Id.* at 503, 101 S.Ct. at 2890. In the context of billboards, for example, the Court noted that the city's interest in traffic safety and its aesthetic interest in preventing

"visual clutter" could prohibit commercial billboards in certain circumstances. *Id.* at 511-12, 101 S.Ct. at 2894-95. Thus, the lesson of *City of Ladue* and *Metromedia*, as Subscribers so succinctly put it, is that "[h]omeowners can place signs in their windows . . . but not billboards on their front lawns because community interests in aesthetics are affected." (Reply Mem. of Pls. Sixty Sutton and Veerman in Support of Mot. for Prelim.Inj. at 3).

[12] The relevant lesson of these two examples, pornography and billboards, is that the government may regulate speech activity, even speech activity taking place in a person's home, in order to protect the interests of third parties. Applying this principle to the case at hand makes it apparent that the Subscribers' claims are not yet ripe.

As to the first prong of the *Abbott Laboratories* test, one may posit certain social interests justifying the imposition of regulatory burdens on Liberty which burdens would affect cable service to the Subscribers. However, those interests can only be debated in the abstract at this point; there is no record from which I can "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." *Metromedia*, 453 U.S. at 502, 101 S.Ct. at 2890 (citations omitted).

For example, the concern has been raised that Liberty, if unrestrained by regulation, would "cherry pick" the most desirable buildings for its cable service. An informative discussion of the perils of cherry picking can be found, ironically enough, in a letter dated April 7, 1992 written on behalf of Liberty to the FCC by W. James MacNaughton, counsel to the Subscribers here, urging the FCC to *defend* the definition of "cable system" in the Cable Act in the *Beach* litigation. (Jacobs Aff. ¶ 9, Ex. T at 1). As counsel stated:

> Stated metaphorically, the Commission has always encouraged "cherry picking" by MDS and SMATV operators to promote competition with cable companies.... But once the "cherries" start getting plucked in bunches, then the interests of the local

> regulators and competing cable companies take on greater importance because more people and buildings in the community are affected. It is quite reasonable for Congress and the Commission to tell Petitioners that they must pick the "cherries" one at a time. This may be unpalatable to Petitioners but it is not unconstitutional.

(Jacobs Aff., Ex. T at 12-13). Thus, as Subscribers must agree, cherry picking, at some point, affects the public interest, and thus the interests of local regulators become more important. However, the facts are not yet developed which would permit me to evaluate the competing interests implicated by the cherry harvest. In any event, there is no final agency action on the issue. *In re Combustion Equip. Assocs., Inc., supra,* 838 F.2d at 37-38 (quoting *Gardner & Toilet Goods Assoc., supra,* 387 U.S. at 171, 87 S.Ct. at 1528).

In looking at the "hardship to the parties" prong of the *Abbott Laboratories* test, just as with Liberty, it cannot be said if and in what way the Subscribers' First Amendment rights might be impaired by the City or the State defendants. As was discussed above in Point IA1b, the assertion that cable service will soon be cut off is unsupported. Merely asserting that Liberty's cable service to Sixty Sutton is going to be disrupted does not make it so. The Standstill Order is not a final determination in the matter. (Grow Aff. ¶ 32). Also, in at least one prior case in which the NYSCC issued an Order to Show Cause, a "Cease and Desist Order" was not issued for a year. *Id.* In addition, that operator was permitted to apply for a franchise, which was granted, and there was *no* interruption in service. *Id.*[38] Balanced against this speculative hardship is the

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[38] The situation here can be distinguished from that in *Patel and Patel v. City of South San Francisco,* 606 F.Supp. 666 (N.D.Cal.1985) when plaintiff operated a "adult hotel" in violation of the zoning ordinance, and part of plaintiff's activities involved the airing of "adult" programming in the motel rooms. *Id.* at 668-69. The plaintiff sought, *inter alia,* a declaration that the ordinance was unconstitutional. *Id.* at 669. The Court

(Footnote continued)

same significant hardship on NYSCC and DOITT as was discussed above with respect to Liberty—premature judicial meddling in their processes. Accordingly, the Subscribers' First Amendment claims are dismissed as not ripe.

2. *Due Process*

The Subscribers' due process claims are jointly pleaded with Liberty's in the sixth and eighth claims in the Second Amended Complaint (¶¶ 89-90, 93-96). Since the City's notice of rulemaking has been issued and contemplates comment by interested parties such as the Subscribers, the Subscribers' due process claims are not yet ripe for the same reasons as Liberty's. *See* section IA2, *supra.*

II. *Equal Protection*

All three plaintiffs assert equal protection claims. They challenge 47 U.S.C. § 522(7), alleging that:

> The Common Ownership Requirement in 47 U.S.C. § 522(7)(B) discriminates between the Common Systems and Non-Common Systems in requiring a "franchise" only for the Non-Common Systems . . . This discrimination in 47 U.S.C. § 522(7)(B) violates equal protection principles of the due process clause of the Fifth Amendment to the United States Constitution . . . under the "strict scrutiny" standard because it adversely affects the fundamental right of Liberty to engage in a speech activity on private property using the Non-Common System at the Sutton Building.

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noted that the case was ripe for adjudication because it was "not disputed that the city will enforce the Ordinance against plaintiff" unless the Court prevented the enforcement. *Id.* The Court also noted that the city sought to enforce the Ordinance in the counterclaim in that very action. *Id.* It simply cannot be said with the same assurance here that the Subscribers face the loss of Liberty's cable service.

(Second Amd.Compl. ¶¶ 83-84). *(See also* Second Amd.Compl. ¶ 88, 90).

A. *Ripeness*

[13] Unlike the other claims raised by plaintiffs, their equal protection claims are ripe. As the Court of Appeals for the District of Columbia explained in *Beach I:*

> Unlike petitioners' First Amendment claim, the "rational basis" claim does not depend on particular circumstances. First, the standard for evaluating that claim does not vary with local conditions.... Second, the application of that standard is also context-invariant.... Thus, the rational-basis claim is "purely legal" for the purposes of *Abbott Laboratories,* and we reach the merits.

959 F.2d 975, 986 (D.C.Cir.1992). The Court of Appeals then directed the FCC to consider within sixty days whether there was some "conceivable basis" for requiring the local franchising of external, quasi-private SMATV facilities but not for wholly private or internal facilities. *Id.* at 987. The fact that the Supreme Court addressed the merits of the *Beach* petitioners' equal protection claims in *Beach III* further indicates that plaintiffs' equal protection claims are ripe. __ U.S. __, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Accordingly, the motion to dismiss these claims on the grounds of ripeness is denied.

B. *Abstention*

[14-16] Defendants have also moved to dismiss the complaint under various theories of abstention. The Supreme Court, however, has repeatedly emphasized that a federal court's obligation to adjudicate claims within its jurisdiction is " 'virtually unflagging.' " *New Orleans Public Service v. Council of the City of New Orleans,* 491 U.S. 350, 359, 109 S.Ct. 2506, 2513, 105 L.Ed.2d 298 (1989) (quoting *Deakins v. Monaghan,* 484 U.S. 193, 203, 108 S.Ct. 523, 530, 98 L.Ed.2d 529 (1988)). Furthermore, "'the presence of a federal basis for jurisdiction,' " as in this case, " 'may raise the level

of justification needed for abstention.' " *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1309 (2d Cir.1990) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n. 21, 96 S.Ct. 1236, 1245 n. 21, 47 L.Ed.2d 483 (1976)). I also note that abstention "remains 'the exception, not the rule.' " *New Orleans Public Service*, 491 U.S. at 359, 109 S.Ct. at 2513 (quoting *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 (1976)). Indeed, the Court of Appeals has recently noted that a federal court would be remiss to abstain from resolving any constitutional challenge—and certainly a constitutional challenge to a federal statute—in the expectation that a state court might reach the issue. The Court explained that "[f]ederal courts do not need to wait for a state court's interpretation of federal constitutional law." *Williams v. Lambert*, 46 F.3d 1275, 1282 (2d Cir.1995). In following these principles, I find that abstention with respect to plaintiffs' equal protection challenge would be inappropriate. Accordingly, the motion to dismiss those claims on the grounds of abstention is denied.

C. Preliminary Injunction

[17] Turning then to the Subscribers' motion for a preliminary injunction, the standard in this circuit for preliminary injunctive relief requires the moving party to demonstrate:

> (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir.1979).

[18] Liberty's claim challenging the distinction drawn between Common Systems and Non-Common Systems is precisely the claim rejected by the Supreme Court in *Beach III*. The Subscribers' claim is virtually identical in that First

Amendment considerations are involved in both claims, but Liberty's are as "speaker" and (assuming that the Subscribers' rights are not derivative of Liberty's), the Subscribers' rights are as "recipients".

In *Beach III,* the Supreme Court addressed the question of whether there was any rational basis justifying the distinction between facilities serving separately owned and managed buildings and those serving one or more buildings under common ownership or management. ___ U.S. at ___, 113 S.Ct. at 2099. The Court reversed the decision of the Court of Appeals for the District of Columbia Circuit, which had held that this portion of the Cable Act was unconstitutional, *id.* at __ ___, 113 S.Ct. at 2100-01, and upheld the constitutionality of the common-ownership distinction in the Cable Act under the rational basis test. *Id.* at ___, 113 S.Ct. at 2103. In part because the Court of Appeals had not considered petitioners' argument that heightened scrutiny was appropriate, the Supreme Court did not reach that argument either. On remand from the Supreme Court, however, the District of Columbia Circuit found that "there is no basis for application of a heightened scrutiny standard" to the question of whether the common-ownership requirement violates Equal Protection. *Beach IV,* 10 F.3d 811 (D.C.Cir. 1993). Thus, the Beach cases effectively preclude the equal protection claims in the instant case.

In its reply memorandum, Liberty attempts to distinguish *Beach III* from the instant case. It writes:

> Both of the Circuit Court decisions and the Supreme Court decision in *Beach* were based on an equal protection analysis of the cross-ownership provisions of the Cable Act. There was never any consideration of the First Amendment burdens imposed by the challenged provisions.

(Liberty's Reply Mem. at 17). It is true that the Supreme Court's decision was limited to an equal protection analysis in *Beach III.* ___ U.S. at ___ n. 3, 113 S.Ct. at 2100 n. 3. However, the reason that the Supreme Court did not address

the constitutionality of § 522(7) under the First Amendment was not, for example, because those claims had never been raised. The reason was, rather, that the petitioners' First Amendment claims were found not yet ripe by the Court of Appeals. *Id.* As discussed *supra*, plaintiffs' First Amendment challenge here is, similarly, non-ripe.

Given the *Beach* Courts' holdings, *supra* and Mr. MacNaughton's apparent admission that regulations designed to avoid cherry-picking "may be unpalatable . . . but . . . are not unconstitutional" (Jacobs Aff., Ex. T at 12-13), plaintiffs cannot demonstrate that they are entitled to a preliminary injunction. They show neither that they have a likelihood of success on the merits, nor that there are sufficiently serious questions going to the merits as to make them a fair ground for litigation. *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., supra,* 596 F.2d at 72. In addition, for the reasons discussed at Point IA1b, plaintiffs have not demonstrated irreparable harm or a balance of hardships tipping decidedly in their favor. Thus, plaintiffs' motion for a preliminary injunction on their equal protection claims is denied.

III. *Plaintiffs' Remaining Claims*

[19] The remaining miscellaneous claims asserted by plaintiffs, *i e.,* the seventh, ninth, tenth, eleventh, and twelfth causes of action, are not ripe, particularly in light of the City's recently-published notice of proposed rulemaking. For example, in plaintiffs' seventh cause of action, they assert that Resolution 1639 is unreasonable pursuant to 47 U.S.C. § 541(a)(1) because it imposes terms and conditions more burdensome than those allowed by 47 U.S.C. § 521 *et seq.* and by New York state law. However, Resolution 1639 does not impose any terms and conditions directly upon Liberty. *See* Resolution 1639. It is, rather, the terms of whatever franchise, if any, that is issued by DOITT which will establish what burdens Liberty may face. Since a franchise has not yet been issued but the notice of rulemaking has been published, it is premature to consider this claim for the reasons set forth above.

Similarly, plaintiffs' ninth claim, that DOITT has violated 47 U.S.C. § 541(a) by refusing to grant Liberty a franchise, is also not yet ripe; DOITT has not so refused.

Plaintiffs' tenth claim asserts that the defendants have made a "final determination denying Liberty" a franchise. (Second Amd. Compl. ¶ 101). Clearly that is not the case, and thus it is not yet appropriate to address this claim.

[20] Plaintiffs' eleventh claim for relief, that 47 U.S.C. § 521 *et seq.* and FCC decisions have preempted the regulatory authority of the City over the provision of "premium" cable service to the Subscribers to the extent that the City may not prevent the receipt of Liberty's "premium" service by the Subscribers is not ripe. The City has not prevented the receipt of Liberty's "premium service", and it is not yet known what actions the City may take.

Finally, plaintiffs' twelfth claim alleges as a catch-all that the defendants deprived plaintiffs of their rights under the Supremacy Clause, the First Amendment, the equal protection and due process clauses of the United States Constitution and 47 U.S.C. § 521 *et seq* in violation of 42 U.S.C. § 1983. Except with respect to the equal protection claims discussed in II, *supra,* the twelfth claim is not ripe for the reasons discussed above.

CONCLUSION

Defendants' motion to dismiss on the ground of lack of ripeness is granted as to plaintiffs' first, second, third, seventh, eighth, ninth, tenth and eleventh claims, as to so much of plaintiffs' sixth claim as asserts a due process claim and as to all of plaintiffs' twelfth claim except that portion of it that asserts an equal protection claim.

With respect to plaintiffs' fourth and fifth claims and so much of their sixth and twelfth claims as assert an equal protection claim, defendants' motions to dismiss on the basis of ripeness and abstention are denied, and plaintiffs' motion for a preliminary injunction is denied.

HON. SOTOMAYOR
U.S. Department of Justice

United States Attorney
Southern District of New York
100 Church Street
New York, New York 10007

January 5, 1995

BY HAND - TO CHAMBERS

Hon. Loretta A. Preska
United States District Judge
United States District Court
Southern District of New York
40 Centre Street - Rm. 620
New York, New York 10007

Re: Liberty Cable Company, Inc., Sixty Sutton Corp. and Bud Holman v. The City of New York, Ralph A. Balzano, Commissioner of Department of Information Technology and Telecommunications, The New York State Commission on Cable Television, William B. Finneran, Gerard D. DiMarco, Barbara T. Rochman, David P. Wilbur, and John Passidomo

94 Civ. 8886 (LAP)

Dear Judge Preska:

I write on behalf of the United States in connection with the above-referenced action. I understand that the Court has signed a certificate pursuant to 28 U.S.C. § 2403(a) certifying to the Attorney General of the United States and the United States Attorney for the Southern District of New York that the constitutionality of 47 U.S.C. §§ 522(b), 522(9), 522(10) and 541 has been drawn into question. I have been advised that the Court has directed that papers opposing plaintiffs' motion for a preliminary injunction be filed by January 13, 1995, and

that plaintiffs' reply papers be filed by January 23, 1995, and that any hearing, if necessary, be held prior to February 8, 1995.

The United States, with the consent of all the parties, respectfully requests that this schedule be extended so that papers opposing plaintiffs' motion be filed by January 31, 1995, plaintiffs' reply papers be filed by February 21, 1995, and that any hearing, if necessary, be held no later than February 28, 1995. The United States needs the additional time to review the papers, determine whether to intervene, and prepare a response, if necessary.

Thank you for your consideration of this matter.

Respectfully submitted,

MARY JO WHITE
United State Attorney

By: /s/Kathy S. Marks
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Counsel have advised that the above extensions of the briefing schedule apply to all parties and that the parties agree to extend the TRO accordingly.

Any hearing or argument on the motion may or may not be held prior to February 28, 1995, but will be held as soon as practicable thereafter. With that understanding and upon the condition that the parties agree to extend the TRO pending resolution of the motion, the above-noted extensions to the briefing schedule are approved.

So ordered

/s/Loretta A. Preska
U.S.D.J.

January 10, 1995

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January 17, 1995

Liberty Cable Company, et. al v.
The City of New York, et. al
94 Civ. 8886 (LAP)

Dear Judge Preska:

I write on behalf of Time Warner Cable of New York City and Paragon Cable Manhattan ("Time Warner") pursuant to Rule 17 of your Honor's Individual Rules and Practices, to request leave to file a Memorandum of Law in excess of thirty pages in opposition to Plaintiffs' Memorandum of Law in Support of their Motion for a Temporary Restraining Order and a Preliminary Injunction. An opposing memorandum in excess of thirty pages is justified because the memorandum must refute the facts as stated by plaintiffs and each of the arguments raised in plaintiffs' Memorandum (which itself is in excess of the Rule's page limits), as well as argue the hardships a preliminary injunction will place on Time Warner. Moreover, in addition to the usual issues on a preliminary injunction motion, there are several jurisdictional issues that need to be addressed. Not having completed our research at this time it is difficult to predict the length of our opposing papers. Therefore, I respectfully request that the Court not set a page limit and I assure the Court we will make every effort to be concise.

If at all possible, I request that your Honor decide this motion prior to the end of this week, so that we are best able to complete our brief within the requisite time.

Respectfully,

/s/Stuart W. Gold

Stuart W. Gold

Hon. Loretta A. Preska
U. S. District Judge
U.S. District Court
Southern District of New York
40 Centre Street, Room 620
New York, NY 10007

Time Warner Cable of New York City and Paragon Cable Manhattan may file a Memorandum of Law in opposition to Plaintiffs' Memorandum of Law in Support of their Motion for a Temporary Restraining Order and a Preliminary Injunction not to exceed forty-five pages.

SO ORDERED

/s/ Loretta A. Preska

LORETTA A. PRESKA
UNITED STATES DISTRICT
JUDGE

January 18, 1995

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306A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LIBERTY CABLE CO., INC., ET AL.,	:	
Plaintiff,	:	94 Civ. 8886 (LAP)
- against -	:	
CITY OF NEW YORK, ET AL.,	:	***ORDER***
Defendant.	:	

----------X

LORETTA A. PRESKA, District Judge:

Having received and read the January 11, 1995 letter of Lewis S. Finkelstein and the January 11, 1995 letter of Marilyn T. Trautfield, the Court hereby revises this Court's Order dated January 10, 1995.

It is hereby ORDERED that the papers opposing plaintiffs' motion for a preliminary injunction be filed by January 31, 1995 and that plaintiffs' reply papers be filed by February 21, 1995; and it is further

ORDERED that counsel attend a conference on March 1, 1995 at 4:00 p.m. in Courtroom 129; and it further

ORDERED that if a hearing is necessary, the hearing will be held on March 10, 1995 at 1:00 p.m. in Courtroom 129; and it is further

ORDERED that the temporary restraining order will be extended until March 10, 1995.

Dated: New York, New York
January 17, 1995

/s/Loretta A. Preska
LORETTA A. PRESKA, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LIBERTY CABLE CO., INC., ET AL.,	:	
Plaintiff,	:	94 Civ. 8886 (LAP)
- against -	:	
CITY OF NEW YORK, ET AL.,	:	***ORDER***
Defendant.	:	

----------X

LORETTA A. PRESKA, District Judge:

The motion of Time Warner Cable of New York City and Paragon Cable Manhattan to intervene in the above-captioned case as defendants is hereby GRANTED.

Dated: New York, New York
February 14, 1995

/s/Loretta A. Preska
LORETTA A. PRESKA, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LIBERTY CABLE CO., INC., ET AL.,	:	
Plaintiffs,	:	94 Civ. 8886 (LAP)
- against -	:	
CITY OF NEW YORK, ET AL.,	:	***ORDER***
Defendants.	:	

----------X

LORETTA A. PRESKA, District Judge:

The parties are hereby notified that the motion to dismiss may be treated as a motion for summary judgment with respect to some or all of the issues raised in the above-captioned case pursuant to Rule 12(c) and Rule 56 of the Federal Rules of Civil Procedure. Parties wishing to make additional submissions to the Court may do so if such submissions are received in chambers before March 7, 1995 at 5:00 p.m.

The parties are also invited to submit additional briefing relating to the relevant issues in *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988), a case brought to the Court's attention by Lewis S. Finkelman at oral argument on March 3, 1995. Any elaboration of the issues must be received in chambers before March 7, 1995 at 5:00 p.m.

Dated: New York, New York
March 6, 1995

/s/Loretta A. Preska
LORETTA A. PRESKA, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LIBERTY CABLE CO., INC., ET AL.,	:	
Plaintiffs,	:	94 Civ. 8886 (LAP)
- against -	:	
CITY OF NEW YORK, ET AL.,	:	***ORDER***
Defendants.	:	

----------X

LORETTA A. PRESKA, District Judge:

The parties are hereby notified that any party who desires a factual hearing to be conducted on March 10, 1995 must notify the Court before noon on March 8, 1995 as to why such a hearing should be held.

Dated: New York, New York
March 7, 1995

/s/Loretta A. Preska
LORETTA A. PRESKA, U.S.D.J.

CONSTANTINE & PARTNERS

A Professional Corporation
909 Third Avenue
New York, NY 10022
212-350-2700
Facsimile 212-350-2701

Leslie F. Spasser
Attorney at Law
212-350-2706

March 9, 1995

VIA HAND DELIVERY

Hon. Loretta A. Preska
United States District Court
620 U.S. Courthouse
Foley Square
New York, New York 10007

Re: *Liberty Cable Co., Inc., et al. v. the City of New York, et al.* 94 Civ. 8886 (LAP)

Dear Judge Preska:

This law firm represents plaintiff Liberty Cable Company, Inc. ("Liberty") in the above-captioned matter. I am writing to voice Liberty's objections to the propriety of the belated submissions filed by Time Warner and the United States. Your March 6, 1995 Order clearly and unambiguously required any and all submissions regarding the issue of summary judgment to be received in chambers by 5:00 p.m. on March 7, 1995. Likewise, your March 7, 1995 Order clearly and unambiguously required all submissions regarding the need for an evidentiary hearing to be received in chambers no later than 12:00 noon on March 8, 1995. These directions clearly were intended to foreclose the parties from engaging in yet another round of argument and reply regarding the issues specified in your Orders.

Yet Time Warner and the United States intentionally ignored the very specific time limits set forth in your Orders. Instead, they waited until all of the other parties had submitted their papers (in compliance with your Orders), and only then issued their own responses. Accordingly, the submissions of Time Warner and the United States are improper and should not be considered or made part of the record in these proceedings. However, if Your Honor decides to consider these late submissions, then Liberty requests the opportunity to respond to the arguments contained therein.

Liberty respectfully requests that this letter, along with Liberty's letter to you dated March 8, 1995, be filed with the Clerk of the Court. Thank you for your consideration of these matters.

Respectfully,

/s/Leslie F. Spasser

Leslie F. Spasser

cc: L. Finkelman (via facsimile)
M. Trautfield (via facsimile)
K. Marks (via facsimile)
M. Schwartz (via facsimile)
S. Gold (via facsimile)
J. MacNaughton (via facsimile)
Clerk of the Court (via hand delivery)

Without deciding whether the letters were timely or not, they will not be considered.

SO ORDERED

March 9, 1995

/s/Loretta A. Preska

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LIBERTY CABLE CO., INC., ET AL.,	:	
Plaintiffs,	:	94 Civ. 8886 (LAP)
- against -	:	
CITY OF NEW YORK, ET AL.,	:	***ORDER***
Defendants.	:	

----------X

LORETTA A. PRESKA, District Judge:

For the reasons stated in the Opinion issued in the above-captioned case dated March 13, 1995, it is hereby

ORDERED that defendants' motion to dismiss on the ground of lack of ripeness is granted as to plaintiffs' first, second, third, seventh, eighth, ninth, tenth and eleventh claims, as to so much of plaintiffs' sixth claim as asserts a due process claim and as to all of plaintiffs' twelfth claim except that portion of it that asserts an equal protection claim; and it is further

ORDERED that with respect to plaintiffs' fourth and fifth claims and so much of their sixth and twelfth claims as assert an equal protection claim, defendants' motions to dismiss on the basis of ripeness and abstention are denied, and plaintiffs' motion for a preliminary injunction is denied.

Dated: New York, New York
March 14, 1995

/s/Loretta A. Preska
LORETTA A. PRESKA, U.S.D.J.

CONSTANTINE & PARTNERS

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212-350-2700
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Leslie F. Spasser
Attorney at Law
212-350-2706

March 16, 1995

MEMO ENDORSED

VIA HAND DELIVERY

Hon. Loretta A. Preska
United States District Court
620 U.S. Courthouse
Foley Square
New York, New York 10007

Re: *Liberty Cable Co., Inc., et al. v. the City of New York, et al.* 94 Civ. 8886 (LAP)

Dear Judge Preska:

I represent Liberty Cable Company, Inc. ("Liberty") in the above-captioned matter. Today, March 16, 1995, Plaintiffs filed an Amended Notice of Appeal from this Court's March 14, 1995 Order. As directed by your law clerk, by this letter, Liberty requests that, pursuant to Fed. R. Civ. P. 62(c), this Court restore its December 22, 1994 Order insofar as that Order restrains defendants the City of New York and the New York State Commission on Cable Television ("NYSCC") from enforcing NYSCC's December 9, 1994 Standstill Order against Liberty and thereby preventing Liberty from providing cable television service to new subscribers in Non-Common Systems.

The Second Circuit's standard for an injunction pending appeal pursuant to Fed. R. Civ. P. 62(c) requires consideration

of the following factors: "(1) whether the petitioner is likely to prevail on the merits of his appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceedings, and (4) wherein lies the public interest." *Hilton v. Braunskill*, 107 S.Ct. 2113, 2119 (1987); *Morgan Guaranty Trust Co. of New York v. Republic of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y. 1988). The district court should apply these factors "flexibly according to the unique circumstances of each case," *Id., citing Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), and is justified in issuing an injunction even if it does not believe that the movant's appeal will prevail on the merits. *Id.*

In their papers and at oral argument, Plaintiffs demonstrated that, at the very least, this case involves "admittedly difficult legal question[s]." *7 Moore's Federal Practice*, ¶62.05 at 62-29. The existence of these "difficult" and complex legal issues causes "the equities of the case [to] suggest that the status quo should be maintained" while plaintiffs' appeal is pending. *Id.* The status quo is embodied by the portion of this Court's December 22, 1994 temporary restraining order which enjoined the enforcement of the Standstill Order. Accordingly, Plaintiffs request that this Court restore the referenced part of its temporary restraining order against NYSCC and the City of New York until the Court of Appeals renders its decision.

Liberty respectfully requests that this Court decide this motion in an expeditious manner. As instructed by the Court, Liberty hereby informs defendants that the Court has requested that any papers in opposition to Liberty's motion be filed in letter form by 5:00 p.m. on Friday, March 17, 1995.

Respectfully,

/s/Leslie F. Spasser

Leslie F. Spasser

MEMO ENDORSED

cc: L. Finkelman (via facsimile)
M. Trautfield (via facsimile)
K. Marks (via facsimile)
M. Schwartz (via facsimile)
S. Gold (via facsimile)
J. MacNaughton (via facsimile)
Clerk of the Court (via hand delivery)

Because plaintiffs have not met the standard set forth in *Able v. United States*, __F.3d__, 1995 WL 4928 (January 3, 1995) Liberty's request for an injunction pending appeal is denied.

SO ORDERED

/s/Loretta A. Preska
LORETTA A. PRESKA
UNITED STATES DISTRICT JUDGE

March 17, 1995

AGENCY RULES

DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

Notice of Proposed Rules Relating
to
Solicitations for Franchises for Cable Television
Service Not Using Inalienable Property of the City

NOTICE IS HEREBY GIVEN, pursuant to the authority vested in the Department of Information Technology and Telecommunications ("DOITT") by City Council Resolution 1639, Section 1072 of the Charter of the City of New York (as amended by Local Law 24 of 1994) and New York State Executive Law Section 819, and in accordance with the requirements of Section 1043 of the Charter, that DOITT hereby proposes rules relating to solicitations for franchisee for cable television service in the City of New York by cable systems which do not use any inalienable property of the City. Language in brackets is hereby deleted; underlined language is hereby adopted.

The proposed rules were not part of DOITT's regulatory agenda for FY 1995. At the time DOITT developed its regulatory agenda for FY 1995, DOITT was unaware of any interest in franchises which would be consistent with the proposed rules and therefore had no basis for proposing such rules. A letter of October 28, 1994 from a potential franchisee stating an interest in such a franchise indicated a need for DOITT to propose rules relating to franchising of cable television services which do not use inalienable property of the City.

DOITT invites public comment regarding the proposed rules. Written comments must be received by DOITT on or before April 3, 1995, at DOITT's offices at 75 Park Place, 6th

Floor, New York, New York 10007, Attention: Eileen Huggard, Assistant Commissioner for Cable Television Franchises. A Public Hearing will be held on April 4, 1995 at 11 a.m. at City Hall, New York, New York 10007.

All written comments and a summary of oral comments received at the Public Hearing, will be available for public inspection within a reasonable amount of time after receipt between the hours of 10:00 a.m. and 4:00 p.m., Monday through Friday.

These proposed rules shall be presented and, to the extent they become effective, shall become effective in accordance with the provisions of Section 1043 of the Charter.

Dated: February 21, 1995 Ralph A. Balzano
Commissioner

CHAPTER 6

§6-01 Definitions: The term "cable service" as used in this Chapter shall have the meaning provided in 47 U.S.C. §522.

The term "off-street franchise" as used in this Chapter shall mean an authorization granted pursuant to this Chapter to provide cable service in the City without using inalienable property of the City.

The term "franchised cable service" as used in this Chapter means a cable service operating pursuant to either an off-street franchise or to a franchise authorizing the use of inalienable property of the City.

§6-02 Application. DOITT will certify as complete an application for an off-street franchise from any person or entity seeking to provide cable service in New York City without using the inalienable property of the City, provided that DOITT has determined that the application meets all of the following requirements in form and substance:

(a) Address. The application is sent certified mail, return receipt requested to the Department of Information Technology and Telecommunications, 11 Metrotech Center,

Brooklyn, New York 11201, attention: Assistant Commissioner for Cable Television Franchises.

(b) Franchise Area. The application specifies one or more franchise areas to which the applicant seeks to provide cable service (each such franchise area must be a complete franchise area as described in §6-04 hereof).

(c) Construction: No Redlining. The application includes a construction plan showing that, and describing in detail how, the applicant can and will provide cable service without using the inalienable property of the City to each and every block within the franchise area within three years in a manner that will allow the applicant to promptly provide its cable service to any resident within the franchise area or areas requesting such service, at non-discriminatory rates.

(d) Financing. The application includes a financing plan which specifies the reasonable anticipated costs of, and adequate, sufficient and reliable sources of financing for, the construction and full provision of cable service throughout the franchise area or areas as required hereunder.

(e) Capacity; State of the Art. The application states that the cable service shall initially contain a minimum of seventy activated downstream video channels and shall, throughout the term of the off-street franchise, be state of the art as defined in City Council Resolution No. 1639.

(f) Public, Educational and Governmental Access. The application specifies that the service will include the same number of channels for public, educational and governmental access as are required to be provided by existing franchised cable service or services serving the franchise area, so that all subscribers to franchised cable services within the franchise area will have access to the public, educational and governmental programming provided on such channels.

(g) Fee. The application acknowledges that a reasonable fee will be payable to the City as reasonable compensation for the City's costs related to cable service regulation and enforcement of the requirements of the off-street franchise.

(h) Identification. The application provides a full description of the direct and indirect ownership of the applicant, including the financial, legal, technical and managerial experience of the applicant and an address at which the applicant is to be contacted.

(i) Deadline. (1) The application is received, in a form which fully complies with all the requirements of this §6-02, by DOITT no later than 5:00 PM on either June 30, 1995 or the date which is ninety days after the date the rules of this Chapter 6 are finally adopted and effective, whichever is later.

(2) DOITT may reopen the application process pursuant to this Chapter 6, at any time it determines there is sufficient interest in off-street franchising to justify such a reopening, by issuing a public notice that it will again accept off-street franchise applications and setting forth a deadline for submission of such applications no less than ninety days from the date of such public notice (in which event the deadline under this subdivision (i) shall be deemed to be such new deadline).

§6-03 Franchise Agreement. Within thirty days of receipt of an application for an off-street franchise pursuant to §6-02 above, DOITT shall notify the applicant at the address specified in the application either that such application has been certified as complete or identifying those items which are incomplete. An applicant which has received notice of an incomplete application shall have until the later of the deadline specified in §6-02(i) above or thirty days after the date of the notice of an incomplete application to file a complete application. Within sixty days of certifying an application as complete DOITT shall prepare and deliver to the certified applicant a proposed franchise agreement between the City and the applicant reflecting the terms of the applicant's certified application, the requirements of City Council Resolution 1639 and such other reasonable terms and conditions DOITT shall determine are appropriate to protect and advance the public interest. No off-street

franchise shall be effective unless and until a franchise agreement has been approved by the Franchise and Concession Review Committee and the separate approval of the Mayor has been granted, all pursuant to and in accordance with Chapter 14 of the City Charter.

§6-04 Franchise Areas. No application will be certified as complete which fails to specify a franchise area which includes at least one entire community board district and which includes at least 30,000 households (according to 1990 census data).

Statement of Basis and Purpose

Pursuant to federal law (47 U.S.C. §541(b)(1)), a "cable operator may not provide cable service without a franchise" from the relevant franchising authority. Also pursuant to federal law (47 U.S.C. §522(5)-(7)) a "cable operator" includes any entity providing cable service by means of a system which uses closed transmission paths (such as, for example, but not limited to, coaxial or fiber optic cable) and associated equipment to connect multiple unit dwellings which are not under common ownership, control or management, whether or not the system uses public rights-of-way. The imposition of a franchise requirement for systems which do not use public rights-of-way was voided as unconstitutional by the United States Court of Appeals, District of Columbia Circuit in Beach Communications, Inc. v. FCC (965 F.2d 1103 (1992)). The Court of Appeals was overruled and the franchise requirement restored by the United States Supreme Court in FCC v. Beach Communications, Inc. (113 S.Ct. 2096 (1993)). Pursuant to New York State Executive Law §819 no cable television system (whether such system does or does not use public rights-of-way) may commence operations unless it has been franchised by the municipality in which it will provide service. Pursuant to subsection 2 of New York State Executive Law §819, municipalities are expressly given the power to grant franchises to cable television systems even if such systems do not use public streets, and municipal charter

franchise provisions (such as §363 and §1072 of the New York City Charter) are expressly expanded to the extent necessary to authorize franchising for cable television systems which do not use public rights-of-way. City Council Resolution Number 1639 (adopted by the Council October 13, 1993) has authorized the New York City Department of Information Technology and Telecommunications (successor to the Department of Telecommunications and Energy pursuant to Local Law 24 of 1994) to grant franchises for the provision of cable television services (defined as cable service is defined in 47 U.S.C. §522). On October 28, 1994, the City received an expression of interest in a franchise on behalf of an entity which has represented that it does not seek to use inalienable property of the City. In light of the unique circumstances presented by franchises of this nature, which are required pursuant to federal and New York State law but do not involve the use of City property, DOITT believes that it is appropriate to commence a rulemaking procedure, proposing rules for the solicitation of franchises for the provision of cable service in a manner that does not use inalienable property of the City. Rulemaking will be useful in providing DOITT with an opportunity to receive and review public comment on the standards and processes which should be applied with respect to this unique form of franchise.

City Council Resolution 1639 sets out certain criteria and minimum requirements for solicitations for cable service franchises, and the proposed rules are intended to be consistent with those criteria and requirements. Comments from the public should take into account the requirements of the Council's authorizing resolution.

Robert Begleiter (RB-7052)
Lloyd Constantine (LC-8465)
Leslie F. Spasser (LS-3943)
Eliot Spitzer (ES-9830)
CONSTANTINE & PARTNERS
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Attorneys for Plaintiff Liberty Cable Company, Inc.

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(908) 634-3700
Attorney for Plaintiffs
Sixty Sutton Corp. and Jack A. Veerman.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBERTY CABLE COMPANY, INC., SIXTY SUTTON CORP. and JACK A. VEERMAN,	:	94 Civ. 8886 (LAP)
Plaintiffs,	:	
v.	:	
THE CITY OF NEW YORK and RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, THE NEW YORK STATE COMMISSION	:	**SECOND AMENDED COMPLAINT**

ON CABLE TELEVISION, :
WILLIAM B. FINNERAN, :
GERARD D. DI MARCO, :
BARBARA T. ROCHMAN, :
DAVID F. WILBUR, and JOHN :
PASSIDOMO, :
:
Defendants, :
:
- and - :
:
THE UNITED STATES OF :
AMERICA, TIME WARNER :
CABLE OF NEW YORK CITY :
and PARAGON CABLE :
MANHATTAN, :
:
Defendants-Intervenors. :
---------- :
X

INTRODUCTION

Liberty Cable Company, Inc. ("Liberty") provides cable television service to approximately 25,000 subscribers in the City of New York (the "City"), without using City property.

Pursuant to federal law, and in particular, 47 U.S.C. §§ 522 and 541, Liberty is required to have a franchise from the City of New York to deliver cable service to some of its subscribers, including Plaintiffs Sixty Sutton Corp. and Jack A. Veerman, despite the fact that the delivery of cable television service to these subscribers does not use any public property or right-of-way.

The City has responded to this federally mandated franchise requirement by refusing to provide any mechanisms or procedures to franchise a cable operator such as Liberty which does not use City property. At the same time, the City and the New York State Commission on Cable Television have taken the position that Liberty may not continue to serve certain subscribers, including Sixty Sutton Corp. and Jack A. Veerman in the manner that it currently serves them.

As a consequence, Liberty and its subscribers have been placed in the untenable position of having to obtain a franchise from the City in order to engage in protected speech activity although they use no City property. At the same time the City refuses to provide any mechanism for a franchise to be obtained while the State Cable Commission confirms the City's intransigence.

Liberty, Sixty Sutton Corp. and Jack A. Veerman seek declaratory and injunctive relief against the City and the New York State Commission on Cable Television for requiring Liberty to obtain a franchise and for failing and refusing to provide any means by which Liberty can obtain a City franchise.

The Parties

1. Plaintiff Liberty Cable Company, Inc. ("Liberty") is a New York corporation with its principal place of business in the City and County of New York.

2. Liberty is engaged in the business of delivering cable television service to the residents of multifamily buildings in New York City, among other places. This cable service provides programming consisting, *inter alia,* of political, artistic and social content protected by the First Amendment.

3. Plaintiff Sixty Sutton Corp. ("Sixty Sutton") is a not-for-profit New York cooperative corporation which owns a 360-unit residential co-operative building at 60 Sutton Place South, New York, New York (the "Sutton Building").

4. Sixty Sutton has a contract with Liberty pursuant to which Liberty provides "basic" cable television service to all the residents of the Sutton Building (the "Sixty Sutton Contract").

5. Plaintiff Jack A. Veerman ("Veerman") is a resident of the Sutton Building.

6. Veerman receives "basic" cable television service from Liberty pursuant to the Sixty Sutton Contract. Veerman also receives "premium" cable television service from Liberty pursuant to a subscription agreement he has directly with Liberty.

7. Defendant City of New York (the "City") is a city in the State of New York.

8. The City's Department of Information Technology and Telecommunications ("DOITT") is the agency responsible for negotiating, granting and administering cable television franchises in the City. DOITT was formerly known as the Department of Telecommunications and Energy ("DTE").

9. Defendant Ralph A. Balzano is the Commissioner of DOITT and is sued in his official capacity.

10. Defendant New York State Commission on Cable Television ("NYSCC") is responsible for the regulation of cable television companies in the State of New York pursuant to Article 28 of the New York Executive Law. When the City grants a television franchise, the NYSCC has the statutory authority to either confirm or deny that franchise.

11. Defendants William B. Finneran, Gerard D. DiMarco, Barbara T. Rochman, David F. Wilbur and John Passidomo (collectively referred to as the "Commissioners") are the Commissioners of the NYSCC and are sued in their official capacities.

Jurisdiction and Venue

12. This is an action for a declaration and enforcement of the Plaintiffs' rights under the First Amendment, Fifth Amendment and the Supremacy Clause of the United States Constitution, 47 U.S.C. § 521 *et seq.* and rulings of the Federal Communications Commission ("FCC"). The Plaintiffs' claims arise under the United States Constitution, 42 U.S.C. §§ 1983 and 1988, 47 U.S.C. § 521 *et seq.* and other laws of the United States. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343(a)(3) and 47 U.S.C. § 555. Venue lies in this Court pursuant to 28 U.S.C. § 1391 because the claims arose in this district.

13. An actual controversy, appropriate for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and injunctive and other necessary relief exists between the parties. The controversy is justifiable in nature and within the jurisdiction of this Court. The controversy is ripe for decision and this Court can render an effective judgment in the interests of justice.

Factual Allegations

A. *Statutory and Regulatory Framework*

14. Under the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*, the FCC was granted the authority to regulate television broadcasting. The Supreme Court has

interpreted this power as extending to the regulation of cable television.

15. The FCC has exercised this preemptive power over cable television by permitting the states to exercise certain authority over the regulation of "traditional" cable television systems, which use large remote antennae to capture television signals. The signals are then delivered to subscribers by coaxial cable or fiber running on, over and under public property.

16. The FCC requires the "cable operator" of such a traditional "cable system" to have a franchise from a state or local "franchising authority." See 47 U.S.C. §§ 522(6); 522(9); 522(10) and 541.

17. The FCC has preempted the authority of state or local jurisdictions to franchise or otherwise regulate alternative methods of cable television distribution such as Satellite Master Antenna Television ("SMATV") and Multichannel Multipoint Distribution Service ("MMDS").

18. The FCC preempted the authority of the State and the City to franchise or otherwise regulate SMATV systems in *In re: Earth Satellite Communications,* 95 F.C.C. 2d 1223 (1983), *aff'd sub nom, New York State Commission on Cable Television v. FCC,* 749 F.2d 804 (D.C. Cir. 1984).

19. A SMATV system utilizes a reception antenna or "receive only earth station" installed on the roof of a multiple unit dwelling. The antenna receives television signals transmitted by satellite or microwave, which are then transmitted by cable to individual residents of the building (and sometime residents of other proximate buildings under common ownership, management or control). This is done without the use of public property or rights-of-way.

20. As defined by the FCC, a cable service which uses public rights-of-way is not a SMATV but a traditional "cable system." 47 U.S.C. §§ 522(7) and 522(7)(B).

21. As defined by the FCC, a cable service which serves more than one multiple unit dwelling *not* under common ownership, management or control is not a SMATV, but a traditional "cable system." 47 U.S.C. § 522(7)(B). If a cable service both does not use public rights-of-way and "serves only subscribers in one or more multiple unit dwellings under common ownership, control or management . . ." (as used herein "Common Ownership Requirement"), it is not a "cable system" and state or local authorities cannot regulate it or require it to obtain a franchise.

22. If the cable service either uses public rights-of-way or physically interconnects by "a set of closed transmission paths" (i.e., cable), two or more multiple unit dwellings not under common ownership, management or control, then its operator is defined by federal law as a "cable operator" which must have a franchise from a state or local authority.

23. Under New York Executive Law Section 819, traditional "cable systems" which under federal law must be franchised, must obtain a franchise from each municipality where they provide service. To be effective, this municipal franchise must then be confirmed by NYSCC.

24. Liberty provides "cable [television] service," as that term is defined by 47 U.S.C. § 522(6) to the residents of multifamily buildings in New York City using satellite and microwave technology. It does this without the use of public property or rights-of-way. A description of the programming offered by Liberty's cable television service is annexed as Exhibit A.

25. Liberty receives satellite and broadcast television signals at its "head end" facility on East 95th Street in Manhattan. Liberty processes the television signals at its head end and then transmits the television signals by microwave to various microwave reception antennas located on multifamily buildings throughout the greater New York metropolitan area.

26. The FCC has granted Liberty all licenses necessary for the transmission and reception of cable television service by microwave.

27. In New York City, Liberty's microwave reception antennas are located on multifamily buildings and they deliver cable television service to the residents of these buildings using the following configurations:

a. *Stand Alone Systems.* In this configuration, Liberty utilizes a single microwave reception antenna to deliver cable television service to the residents of a single multifamily building upon which the antenna is located;

b. *Common Systems.* In this configuration, Liberty utilizes a single microwave reception antenna to deliver cable television service to the residents of two or more multifamily buildings that are under common ownership, control or management. The single microwave reception antenna is located on one building and a coaxial cable, using only private property, runs to the other building(s) in the Common Systems;

c. *Non-Common Systems.* In this configuration, Liberty utilizes a single microwave reception antenna to provide cable television service to the residents of two or more multifamily buildings that are not under common ownership, control or management. The single microwave reception antenna is located on one building and a coaxial cable, using only private property, runs to the other building(s) in the Non-Common Systems.

28. The Stand Alone Systems, the Common Systems and the Non-Common Systems are referred to collectively herein as the "Liberty's Systems."

29. Liberty's Stand Alone systems and Common Systems are SMATV systems. They are not "cable systems" pursuant to 47 U.S.C. § 522(7) because they serve buildings that meet the Common Ownership Requirement in 47 U.S.C. § 522(7)(B) and do not use any public right-of-way. Therefore, Liberty is not a "cable operator" of the Stand Alone Systems nor of the Common Systems and is not required by 47 U.S.C.

§ 541 to have a "franchise" for either the Stand Alone Systems or the Common Systems.

30. The Non-Common Systems are "cable systems" pursuant to 47 U.S.C. § 522(7) because the buildings they serve do not meet the Common Ownership Requirement in 47 U.S.C. § 522(7)(B). Thus Liberty, as a "cable operator" of these "cable systems," is required by 47 U.S.C. § 541 to have a "franchise" from a "franchising authority" for the operation of the Non-Common Systems, despite the fact that there is no use of City property or any public right of-way.

31. Liberty constructed the Non-Common Systems between January 1993 and August 1994.

32. Veerman and the other residents of the Sutton Building are served by a Non-Common System that serves more than fifty (50) and fewer than one thousand (1,000) subscribers. The microwave reception antenna that serves Holman and other residents of the Sutton Building is not located on the Sutton Building.

33. From April 27, 1992 to August 23, 1994 and specifically during the time Liberty constructed the Non-Common Systems, NYSCC and the City adopted the policy that a cable television system which did not use City property or public rights-of-way did not qualify for nor was required to obtain a franchise.

34. On December 23, 1991, the Russian American Broadcasting Company ("RABC") applied to the City for a cable television franchise to provide satellite television programming using a system configuration identical to the Non-Common Systems. A copy of that application is annexed as Exhibit B.

35. On April 27, 1992, the City, through DOITT, advised RABC that RABC did not need a license, revocable consent or franchise from the City to provide cable television service to a system configuration identical to the Non-Common Systems because there would be no use of the "inalienable property of the City for either private or public purposes" (the

"RABC Decision"). A copy of the RABC Decision is annexed as Exhibit C.

36. After the RABC Decision, Liberty was informed by William Squadron, then the Commissioner of DTE, that a cable television franchise would not be required for the Non-Common Systems so long as Liberty's cable or other facilities did not use public rights-of-way.

37. In reliance on the RABC Decision and the assurance of DTE, Liberty constructed and operated the Non-Common Systems without applying to the City for a cable television franchise.

38. NYSCC and the Commissioners were informed and fully aware of the RABC Decision at the time it was rendered and, up until August 23, 1994, took no action nor made any statement to repudiate or question the validity of the RABC Decision.

39. Time Warner Cable of New York City and its affiliate Paragon Cable of Manhattan (jointly referred to herein as "Time Warner") provide cable television service in Manhattan in competition with Liberty. Time Warner has a franchise from the City of New York to provide cable television service in Manhattan. Unlike Liberty, Time Warner's traditional facilities use public rights-of-way.

40. Time Warner's service is available to Holman and any other residents of the Sutton Building.

41. On or about May 27, 1994, Time Warner filed a complaint with NYSCC alleging that Liberty has "employed physical connections to provide cable service to Liberty's subscribers living in diversely owned and controlled multiple dwellings in Manhattan. Under state and federal law such manner of operating renders Liberty a cable operator and cable television company, prohibited from operating without a franchise." Time Warner asserted that Liberty needed a cable television franchise from the City pursuant to Article 28 of the New York State Executive Law to operate the Liberty Systems. Time Warner specifically cited the Sutton Building

as an example of a "cable system" where Liberty needs a "franchise."

42. On or about August 23, 1994 and in response to Time Warner's complaint, NYSCC issued an Order to Show cause to Liberty, a true copy of which is annexed as Exhibit D. The Order to Show Cause requires Liberty to show cause why the Liberty Systems, including the Non-Common System at Sixty Sutton, should not be subject to the cable television franchise requirement or, in the alternative, why the connecting cable in the Non-Common Systems, including the Non-Common System at Sixty Sutton, should not be cut.

43. In response to the Order to Show Cause, Liberty asked DOITT how Liberty could obtain a cable television franchise for the Non-Common Systems.

44. DOITT informed Liberty that currently, there was no procedure by which Liberty could obtain a cable television franchise for the Non-Common Systems.

45. DOITT informed Liberty that the only procedure for the City to grant cable television franchises in addition to those previously granted to Time Warner's cable systems was as set forth in Resolution No. 1639, adopted by the City Council, the City's legislative body, on October 13, 1993 ("Resolution 1639"). Resolution 1639 authorizes DOITT "to grant non-exclusive franchises for the provision of cable television services and the installation of cable television facilities and associated equipment *on, over, and under the inalienable property of the City of New York*" (emphasis added). A true copy of Resolution 1639 is annexed as Exhibit E.

46. The City has not authorized DOITT to grant any cable television franchise for cable systems configured like the Non-Common Systems, i.e., cable systems whose facilities do not use public property or rights-of-way.

47. DOITT informed Liberty that Resolution 1639 requires that an applicant for a cable television franchise submit a bid to DOITT for a franchise in response to a request for proposal ("RFP").

48. Resolution 1639, adopted in October 1993, directed DOITT to prepare RFP's. To date, DOITT has still not prepared any RFP pursuant to Resolution 1639. In October 1994, DOITT informed Liberty that DOITT does not expect to prepare any RFP's pursuant to Resolution 1639 for many months.

49. In or about October 1994, DOITT informed Liberty that it was abandoning its position that cable systems which do not use City property or public rights-of-way do not require or qualify for a cable television franchise, as DOITT had previously articulated in the RABC decision.

50. The City, through DOITT, abandoned its previous position and the RABC decision without advance notice and without affording Liberty, Sixty Sutton, Holman or any other similarly situated party the opportunity for a hearing concerning these issues.

51. On or about September 13, 1994, the City requested that NYSCC issue an "immediate standstill order" prohibiting the construction of any additional Non-Common Systems by Liberty, despite the fact that such systems do not utilize City property or public rights-of-way.

52. The NYSCC informed Liberty that it was abandoning its position that cable systems which do not use public property or rights-of-way do not require a cable television franchise, as DOITT had previously articulated in the RABC decision, of which NYSCC had knowledge and accepted until August 23, 1994.

53. Subsequent to August 23, 1994, NYSCC informed Liberty that in order to continue operation of the Non-Common Systems, which do not use public property or rights-of-way, Liberty must have a cable television franchise from the City confirmed by NYSCC.

54. NYSCC abandoned its previous position and its acceptance of the RABC decision without advance notice and without affording Liberty, Sixty Sutton, Holman or any other

similarly situated party the opportunity for a hearing concerning these issues.

55. DOITT has informed Liberty that it will only grant cable television franchises in accordance with the terms and conditions set forth in Resolution 1639, which by its very terms and conditions do not apply to Liberty, which does not use, does not need to use, nor has any intention of using the "inalienable property of the City of New York" in connection with the provision of its video programming services.

56. In as much as the City has not enacted any authority to enable it to issue franchises to cable operators not using City property, nor has it issued any RFP's under its current and inapposite Resolution 1639, it will take months if not years before the City even purports to have a procedure for the issuance of any new cable television franchises, let alone franchises for those who, like Liberty, do not use the City's inalienable property. During this period prior to the City's establishment of a procedure for issuing licenses, Liberty is, according to DOITT and NYSCC, both precluded from operating its Non-Common Systems and prevented from obtaining a franchise for their continued operation.

57. On or about November 18, 1994, NYSCC issued a Notice of Hearing scheduling a hearing on Time Warner's petition for December 9, 1994. A copy of the Notice of Hearing is annexed as Exhibit F. Neither Veerman nor Sixty Sutton are a party to the NYSCC proceeding.

58. On December 9, 1994, NYSCC began the hearing on Time Warner's petition. NYSCC issued several procedural rulings about the manner in which the hearing would be conducted at a later unspecified date.

59. On December 9, NYSCC also issued an immediate "standstill order" prohibiting Liberty from constructing any additional Non-Common systems, despite the fact that such systems do not utilize public property or rights-of-way. The portion of the transcript of the December 9 hearing where NYSCC issued this standstill order is annexed as Exhibit G.

60. The City, and specifically DOITT, failed to make an appearance at the December 9 hearing. The City did not appear despite the fact that it had been notified of the hearing designated by NYSCC as an "interested party" and invited to appear. Exhibit F.

61. Instead of appearing at the December 9 hearing, the City sent a letter to Defendant William Finneran, Chairman of NYSCC, a copy of which is attached as Exhibit H. Consistent with its previous intransigent position the City stated only that "the Department of Information Technology and Telecommunications currently is considering various issues affecting cable system franchising in the City, and we are unable to testify as to these deliberations at this time."

62. The City has in effect, admitted Liberty's contention that it has no procedure for issuing a franchise to a cable service which like Liberty does not utilize the inalienable property of the City.

63. Moreover, although the City requested and was fully apprised that the NYSCC proceeding would result in the "standstill order" and the ultimate termination of Liberty's existing Non-Common Systems, the City manifested utter indifference to the plight of its residents, such as Plaintiff Holman, who receive their cable service from one of Liberty's Non-Common Systems.

64. NYSCC officials have informed Liberty that in their view, the Non-Common Systems cannot be operated without a cable television franchise from the City, confirmed by NYSCC. NYSCC officials have also informed Liberty that Common Systems serving buildings with common management may, in their view, also be "cable systems" subject to the franchise requirement.

65. The Non-Common Systems are "cable systems" as that term is defined in 47 U.S.C. § 522(7) to the extent the Non-Common Systems serve "subscribers," as that term is defined by the FCC. It will be impossible for Liberty to obtain a cable television franchise from the City for the Non-Common

Systems pursuant to Resolution 1639 or any other procedure before the hearing set by NYSCC has concluded and NYSCC has rendered its decision. NYSCC will then, in the absence of Liberty obtaining a cable television franchise from the City, order Liberty to cease and desist its current operations or sever connecting cable at the Non-Common Systems.

66. Liberty's delivery of cable television service to its subscribers in the Non-Common Systems will be terminated by order of NYSCC.

67. Liberty's delivery of cable television service to Holman, Sixty Sutton and the residents of the Sutton Building will be terminated by order of NYSCC.

68. NYSCC may also impose fines and other sanctions on Liberty.

69. Liberty has ceased constructing Non-Common Systems and is foregoing requests to serve new subscribers by constructing and operating new Non-Common Systems because of the City's actions and conduct.

70. Defendants, individually and collectively, are interfering with Liberty's operation of existing Non-Common Systems and the construction and operation of new Non-Common Systems by:

a. threatening to prohibit Liberty from operating the Non-Common Systems and actually prohibiting Liberty from constructing and operating new Non-Common Systems which do not use City property, unless and until Liberty has obtained a cable television franchise;

b. arbitrarily abandoning its position that cable systems which do not use City property or public rights-of-way do not need or qualify for a cable television franchise, as articulated in the RABC Decision and as implicitly recognized in Resolution 1639;

c. failing to enact authority to enable the City to issue franchises to cable systems, such as the Non-Common

Systems, which do not use the inalienable property of the City of New York;

d. failing to issue any RFP's under Resolution 1639, enacted on October 13, 1993, which purports to enable the City to issue franchises to cable systems which utilize the inalienable property of the City of New York;

e. threatening and calling into question whether and the extent to which Liberty is lawfully operating the Non-Common Systems, including the Non-Common System at the Sutton Building;

f. failing and refusing to issue a franchise to Liberty authorizing the continued operation of the Non-Common Systems, including the Non-Common System at the Sutton Building.

g. failing and refusing to issue a franchise to Liberty authorizing the continued operation of the Non-Common Systems and the construction and operation of new Non-Common Systems.

FIRST CLAIM FOR RELIEF
FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

71. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 70 with the same force and effect as if here set forth in full.

72. 47 U.S.C. § 522(7) defines the Non-Common Systems as "cable systems" subject to the franchising requirement of 47 U.S.C. § 541(b), despite the fact that such systems do not use any public property or right-of-way.

73. The operation of the Non-Common Systems, including the Non-Common System at the Sutton Building, is a speech activity on private property protected from government interference and unwarranted and burdensome government regulation by the First Amendment to the United States Constitution.

74. The imposition of a franchise requirement on the Non-Common Systems, including the Non-Common System operated at the Sutton Building prevents, burdens, violates and interferes with Plaintiff's rights to engage in protected speech activity on private property in violation of the First Amendment to the United States Constitution.

75. 47 U.S.C. §§ 522(7) and 541(b) are invalid facially and as applied to the Non-Common Systems, which do not utilize any public property or rights-of-way.

SECOND CLAIM FOR RELIEF
FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

76. Bud Holman and Sixty Sutton repeat and reallege each and every allegation contained in paragraphs 1 through 75 with the same force and effect as if here set forth in full.

77. The operation of the Non-Common System at the Sutton Building, is a speech activity on private property protected by the First Amendment.

78. Defendants' conduct which, *inter alia,* includes the prohibition of Liberty's operation of the Non-Common Systems without a franchise, and the failure to provide the terms and conditions for the issuance of a franchise to cable systems which do not use public property or rights-of-way, prevents, burdens, violates and interferes with Jack A. Veerman's and Sixty Sutton's rights to engage in protected speech activity on private property in violation of the First Amendment.

THIRD CLAIM FOR RELIEF
FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

79. Liberty repeats and realleges each and every allegation contained in paragraphs 1 through 75 with the same force and effect as if here set forth in full.

80. The operation of the Non-Common Systems, including the Non-Common System at the Sutton Building is a speech

activity on private property protected by the First Amendment.

81. Defendants' conduct which, *inter alia,* includes the prohibition of Liberty's operation of the Non-Common Systems without a franchise, and the failure to provide the terms and conditions for the issuance of a franchise to cable systems which do not use public property or rights-of-way, prevents, burdens, violates and interferes with Liberty's rights to engage in protected speech activity on private property in violation of the First Amendment.

FOURTH CLAIM FOR RELIEF
FIFTH AMENDMENT TO THE UNITED
STATES CONSTITUTION

82. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 81 with the same force and effect as if here set forth in full.

83. The Common Ownership Requirement in 47 U.S.C. § 522(7)(B) discriminates between the Common Systems and Non-Common Systems in requiring a "franchise" only for the Non-Common Systems.

84. This discrimination in 47 U.S.C. § 522(7)(B) violates equal protection principles of the due process clause of the Fifth Amendment to the United States Constitution ("Fifth Amendment") under the "strict scrutiny" standard because it adversely affects the fundamental right of Liberty to engage in a speech activity on private property using the Non-Common System at the Sutton Building.

FIFTH CLAIM FOR RELIEF
FIFTH AMENDMENT TO THE UNITED
STATES CONSTITUTION

85. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 84 with the same force and effect as if here set forth in full.

86. Veerman and the other residents of the Sutton Building who receive Liberty's cable television service through a Non-Common System are similarly situated to other Liberty subscribers who receive the same service through Stand Alone and Common Systems.

87. Veerman, Sixty Sutton Corp. and the residents of the Sutton Building are subject to the City's regulatory authority over their Liberty service because of the Common Ownership Requirement in 47 U.S.C. § 522(7)(B). The exercise of the City's authority will interfere with the ability of Veerman, Sixty Sutton and the residents of the Sutton Building to receive Liberty's cable television service.

88. The discrimination in 47 U.S.C. § 522(7)(B) violates equal protection principles of the due process clause of the Fifth Amendment under the "strict scrutiny" standard because it adversely affects the fundamental right of Sixty Sutton and Veerman to engage in a speech activity on private property using the Non-Common System at the Sutton Building.

SIXTH CLAIM FOR RELIEF
FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

89. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 88 with the same force and effect as if here set forth in full.

90. Defendants' conduct constitutes a denial of Plaintiffs' right to due process and equal protection in violation of the Fourteenth Amendment to the United States Constitution.

SEVENTH CLAIM FOR RELIEF
47 U.S.C. SECTION 541

91. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 90 with the same force and effect as if here set forth in full.

92. Resolution 1639 is unreasonable pursuant to 47 U.S.C. § 541(a)(1) because it

a. imposes terms and conditions that are inconsistent with and more burdensome than those allowed by 47 U.S.C. § 521 *et seq.;* and

b. imposes terms and conditions upon Liberty to provide cable television service using the Non-Common System at the Sutton Building in a manner that is inconsistent with and more burdensome than the requirements of New York Executive Law § 813(2), which applies to cable operators with more than fifty and under one thousand subscribers.

EIGHTH CLAIM FOR RELIEF
FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

93. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 92 with the same force and effect as if here set forth in full.

94. Resolution 1639, by its very terms, does not apply to the Non-Common Systems because the Non-Common systems do not use the inalienable property of the City of New York. Resolution 1639 applies only to "the installation of cable television facilities and associated equipment on, over, and under the inalienable property of the City of New York."

95. Notwithstanding the manifest inapplicability of Resolution 1639 to the Non-Common Systems, defendants the City and Balzano are relying upon its terms as the only mechanism by which Liberty may obtain a franchise for the Non-Common Systems.

96. With the exception of its clear inapplicability to the Non-Common Systems, Resolution 1639 (Exhibit "E") is vague, and vests the City and DOITT with normless and unfettered discretion to grant or deny cable television franchises. Resolution 1639 purports to grant the City and DOITT normless and unfettered discretion to prevent and burden protected speech activity and is therefore facially invalid as violative of the due process clause of the Fourteenth Amendment.

NINTH CLAIM FOR RELIEF
47 U.S.C. SECTION 541

97. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 96 with the same force and effect as if here set forth in full.

98. 47 U.S.C. § 541(a) provides that the City "may not unreasonably refuse to award an additional competitive franchise."

99. The City's conduct, including, without limitation, abandoning its position that cable systems that do not use City property or public rights-of-way do not require or qualify for a franchise as articulated in the RABC Decision, requesting a "standstill order" from NYSCC, unreasonably insisting on Liberty's acceptance of Resolution 1639, refusing to issue an RFP and refusing to grant Liberty a franchise constitutes an unreasonable refusal to award an additional competitive franchise in violation of 47 U.S.C. § 541(a).

TENTH CLAIM FOR RELIEF
47 U.S.C. SECTION 555

100. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 99 with the same force and effect as if here set forth in full.

101. Defendants' conduct constitutes a final determination denying Liberty a second franchise which entitles Liberty to commence this action in this Court pursuant to 47 U.S.C. § 555.

ELEVENTH CLAIM FOR RELIEF
47 U.S.C. SECTION 521

102. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 101 with the same force and effect as if here set forth in full.

103. Sixty Sutton is not a "subscriber" as that term is defined by the FCC. Accordingly, Liberty is not acting as a "cable operator" when it provides "basic" cable television

service to Veerman and other residents of the Sutton Building pursuant to the Sixty Sutton Contract.

104. 47 U.S.C. § 521 *et seq.* and the decisions of the FCC have preempted the regulatory authority of the City over the provision of "premium" cable television service to Veerman and other Sutton Building residents to the extent that the City may not prevent, directly or indirectly, the receipt of Liberty's "premium" cable television service by Veerman or other Sutton Building residents.

TWELFTH CLAIM FOR RELIEF
SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

105. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 104 with the same force and effect as if here set forth in full.

106. The acts, conduct and practices of Defendants, all under color of state law, deprive Plaintiffs of their rights arising under the Supremacy Clause, the First Amendment, the equal protection and due process clauses of the United States Constitution and 47 U.S.C. § 521 *et seq.* in violation of 42 U.S.C. § 1983. Defendants' conduct is designed to cause Plaintiffs harm to their property and liberty interests, both present and prospective, and to prevent them from properly possessing, using or disposing of their property and properly exercising their liberty interests.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully demand judgment as follows:

l. That the Court declare that 47 U.S.C. §§ 522(7) and 541(b) are unconstitutional as applied to the Non-Common Systems, including the Non-Common System at the Sutton Building, which do not utilize public property or rights-of-way.

2. That the Court adjudge and decree that the Defendants have committed the violations of federal law alleged herein.

3. That the Court declare that Defendants' conduct is a violation of the First Amendment and enjoin the Defendants from requiring Liberty to obtain a cable television franchise for any of the Non-Common Systems, including the Non-Common System at the Sutton Building, or, in the alternative, direct the City and Balzano to immediately issue, and the Commissioners and NYSCC to confirm, a cable television franchise to Liberty for the provision of cable television service on the Non-Common Systems, both existing and prospective, including the Non-Common System at the Sutton Building.

4. That the Court declare that the Common Ownership Requirement in 47 U.S.C. § 522(7)(B) does not apply to Liberty in the provision of cable television service in New York City and enjoin Defendants from requiring Liberty to obtain a cable television franchise for any of the Non-Common Systems, including the Non-Common System at the Sutton Building.

5. That the Court declare that Defendants' conduct violates the due process and equal protection clauses of the Fourteenth Amendment and enjoin Defendants from requiring Liberty to obtain a cable television franchise for any of the Non-Common Systems, including the Non-Common System at the Sutton Building or, in the alternative, direct the City and Balzano to immediately issue, and the Commissioners and NYSCC to confirm, a cable television franchise to Liberty for the provision of Liberty's cable television service on the Non-Common Systems including the Non-Common System at the Sutton Building.

6. That the Court declare that Defendants' conduct violates 47 U.S.C. § 541 and enjoin Defendants from requiring Liberty to obtain a cable television franchise for any of the Non-Common Systems, including the Non-Common System at the Sutton Building or, in the alternative, direct the City and Balzano to immediately issue, and the Commissioners and NYSCC to confirm. a cable television franchise to Liberty for

the provision of Liberty's cable television service on the Non-Common Systems, including the Non-Common System at the Sutton Building.

7. That the Court declare that Defendants have no regulatory authority over the provision of "basic" or "premium" cable television service by Liberty to Veerman or other Sutton Building residents and enjoin Defendants from requiring Liberty to obtain a cable television franchise for any Non-Common System, including the Non-Common System at the Sutton Building.

8. That the Court declare that Defendants' conduct violates 42 U.S.C. § 1983 and enjoin Defendants from requiring Liberty to obtain a cable television franchise for any of the Non-Common Systems, including the Non-Common System at the Sutton Building or, in the alternative, direct the City and Mr. Balzano to immediately issue, and the Commissioners and NYSCC to confirm, a cable television franchise to Liberty for the provision of Liberty's cable television service on the Non-Common Systems, including, without limitation, the Non-Common System at the Sutton Building, together with the award of attorneys' fees and costs and such other relief as the Court deems appropriate.

Dated: New York, New York
February 21, 1995

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EXHIBIT A

LIBERTY CABLE TELEVISION

2	WCBS - New York	38	International Channel
3	Prevue Guide	39	Discovery
4	WNBC - New York	40	BET
5	WNYW - New York	41	WXTV-New Jersey
6	WTBS - Atlanta	42	CNBC
7	WABC - New York	**43	**Viewers Choice 1**
8	CNN	**44	**Viewers Choice 2**
9	WWOR - New York	**45	**Spice**
10	ESPN	•46	**NEWSPORT**
11	WPIX - New York	47	WNJU - New Jersey
12	Lifetime	48	VH-1
13	WNET - New York	49	MTV
*14	**HBO**	50	E! Entertainment
*15	**CINEMAX**	51	Weather Channel
*16	**SHOWTIME**	52	WGN - Chicago
*17	**THE MOVIE CHANNEL**	53	CNN Headline News
*18	**DISNEY**	54	Home Shopping Network
*19	**PLAYBOY**	55	Turner Classic Movies
20	Bravo	56	Sci-Fi Channel
21	WLIW - Long Island	57	KTLA - Los Angeles
*22	**SPORTSCHANNEL**	58	United Nations TV/MSG II

23	AMC	59	WSBK - Boston
+24	MSG	60	The Cartoon Network
25	WNYE - New York	61	QVC
26	A & E	62	The Learning Channel
27	Family Channel	63	Bloomberg Direct
28	Nickelodeon	64	America's Talking
29	Comedy Central	66	ESPN 2
30	PPV Previews	67	TV Food Network
31	WNYC - New York	68	Court TV
32	TNT	69	Building Video Surveillance
33	USA		
34	Nashville Network	70	Building Electronic Bulletin Board
* 35	**TV JAPAN**		
36	C-SPAN		
37	C-SPAN 2		

* Premium Channels. Effective 12/94

** Pay-Per-View Channels.

+ MSG Events occasionally shown on MSG II, channel 58.

• Premium Channels available only in bulk.

Customer Service	Emergency Service
7:00 am - 11:00 pm	11:00 pm-7:00 am
212-891-7770	212-891-7788

EXHIBIT B

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December 23, 1991

Chris Collins, Esq.
NYC Department of
Telecommunications & Energy
75 Park Place
6th Floor
New York, NY 10007

Re: *Russian American Broadcasting Company*

Dear Chris:

I want to thank you for meeting with me and David Moro of the Russian American Broadcasting Company (the "Company") to discuss the Company's plan for operating a satellite delivered Russian langauge video and audio service in New York City (the "City"). As we discussed, the Company is seeking a license from the City and the New York State Commission on Cable Television ("NYSCC") to operate as a cable television system in New York City.

At your request, this letter sets forth the Company's view on your question about whether the City has the authority to issue a cable television license to the Company. As discussed in more detail below, the answer to that question is clearly yes pursuant to Executive Law § 819(2). This letter also addresses the procedure the City should follow in processing the Company's license application. As discussed in more detail below, that procedure is set forth in 9 NYCRR Part 594.

Description of the System

The Company currently delivers a single channel radio programming service by scrambled signal over an FM sideband to paying subscribers. The programming is entirely in the Russian language and includes news and community affairs. Almost all of the programming is created by the Company at its studio in Fort Lee, NJ. The subscribers are predominantly members of the Russian emigre community. The Company and its subscribers regard the service as a significant aid for the subscriber's assimilation into American society. The service also provides subscribers with a unique link to the events unfolding in their homeland.

The Company is now implementing a plan to expand its service to a single channel video and multiple channel audio service. The 24 hour programming will continue to be exclusively in the Russian language. Much of the programming will emphasize community affairs and some programming will be purchased from program producers in the recently created Russian Republic. The Company's service will be delivered nation-wide from a high powered satellite also known as a Ku-Band satellite. Reception will be through a relatively small (1.2 meter) satellite dish antenna.

Virtually all of the company's target audience in the City lives in multi-family housing–predominately in the Brighton Beach section of Brooklyn and Kew Gardens in Queens. In the absence of a cable television license from the City, the Company will have to negotiate with the owner of each building for the right to install and operate its satellite reception and distribution equipment on the premises.

However, once the Company obtains a cable television license, it will be able to install and operate its equipment at multi-family properties by statutory right pursuant to Executive Law § 828. This is the primary reason the Company is seeking a cable television license.

The system configuration will be a small Ku-Band satellite dish antenna on the roof of one building in a block. Cables

will then run from that antenna to other buildings on the block where service is requested. The buildings linked together will not be under common control, management or ownership. At no time will any cables or other equipment use or occupy any public streets, rights of way or other City property. One antenna will be installed on each block and thus eliminate the need for crossing streets with cable. The service will be provided in any building in the City where a resident requests it.

The configuration of the Company's system will make it a "cable system" as defined in 47 USC § 522(6) of the federal Cable Communications and Policy Act of 1984 (the "Cable Act"). See *In Re Definition of a Cable Television System*, FCC Report and Order adopted October 11, 1990, released December 21, 1990, MM. Docket No. 89-35. Under the Cable Act, the Company will provide "cable service" on its "cable system" and is therefore required to obtain a "franchise" from the "franchising authority" pursuant to 47 USC § 541(b). The "franchising authority" is both the City and NYSCC. *Cf., City of Burlington v. Mountain Cable Company*, 559 A.2d 153, 155 (Vt. 1988).

The Company's system will also be a "cable television system" under New York state law, Executive Law § 812(2). The Company is thus required to obtain both a franchise from the City pursuant to Executive Law § 819(1) and a certificate of confirmation from NYSCC pursuant to Executive Law § 821.

As we discussed, the Company plans do not include and will not support the multi-channel capacity one commonly associates with cable television. Accordingly, the Company does not plan and will not use a 36 channel system nor will it make channel capacity available for public-educational-governmental (PEG) or leased access purposes, notwithstanding the requirements of 9 NYCRR § 595.4 andf 595.1(p).

We have had discussions with NYSCC officials on these and other related issues. We have told NYSCC that once the Company has obtained the City's approval for operation as a cable system, the Company will seek a waiver of 9 NYCRR

§§ 595.1(p) and 595.4 and other regulations inconsistent with the Company's service. We have asked NYSCC officials for some indication of whether such a waiver will be granted. We have not, as of the date of this letter, received any indication from the NYSCC officials of their position in this issue.

The Company could, if it so chose, install its satellite dish antennas on each multi-family property in which its subscribers live. Such a configuration would exempt the Company from the franchise requirement as a satellite master antenna television system ("SMATV"). See *In Re Earth Satellite Communications*. 95 FCC 2d 1223 (1983); *aff'd. sub. nom. New York State Comm'n on Cable Television v. Federal Communications Comm'n.*, 749 F.2d 804 (D.C. Cir. 1984). However, this configuration requires the needless expenditure of additional money to duplicate satellite dish antenna facilities. It would also deprive the Company of the opportunity to obtain access to the building pursuant to Executive Law § 828.

The City is Authorized to Grant the Company a Cable Television License

You will note that I have carefully described the Company's applicatioin as one for a cable television *license*. This is a deliberate choice of words to avoid confusion over the term "franchise". The term "franchise" has significantly different meanings and legal effects when used in the application of federal, state and municipal law.

The federal Cable Act defines a "franchise" in 47 USC § 522(8) as

> an initial authorization issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.

The federal Cable Act provides that a "franchise" authorizes the construction or operation of a "cable system". The Company's system will be a "cable system" even though it

does not use or occupy public rights of way. As such, it will need a license or a "franchise" as that term is used in the federal Cable Act.

The New York state definition of a cable television "franchise" is also quite broad and is not limited to a cable system which uses public rights of way. Executive law § 812(4) provides that

> "Franchise" shall mean and include any authorization granted by a municipality in terms of a franchise, privilege, permit, license or other municipal authorization to construct, operate, maintain, or manage a cable television system in any municipality.

As with the federal Cable Act, the state definition contemplates a "franchise" authorizing the construction and operation of a "cable television system" within the municipality. The Company's system is a "cable television system", even though it does not use or occupy public rights of way, pursuant to Executive Law § 812(2).

Executive Law § 819(2) provides

> A municipality shall have the power to require a franchise of any cable television system providing service within the municipality, notwithstanding that said cable television system does not occupy, use or in any way traverse a public street. The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent, necessary, to authorize such franchises.

Notably, the second sentence of this section empowers the City to grant a "franchise" – as that term is defined in the Executive Law – to authorize or "license" the contruction and operation of a cable television system. The City is explicitly empowered by Executive Law § 819(2) to grant the authorization or "license" the Company needs to operate its cable television system in New York City. And that license may be

granted by the City notwithstanding the fact that the Company's cable system does not use public rights of way.

In contrast to the federal and state cable statutes, the New York City Charter limits the City's ability to grant a "franchise" to the use of City property. New York City Charter § 362(b) provides that "Franchise shall mean a grant by an agency of a right to occupy or use the inalienable property of the city to provide a public service."

The Company is not seeking a "franchise" from the City as that term is used in the New York City Charter. The Company does not need nor does it seek to use or occupy "the inalienable property of the city."

Rather, the Company is seeking the authorization of the City to install and operate a "cable television system"–as that term is defined in the federal and state cable statutes. Accordingly, the Company is describing the authorization it seeks from the City as a "lic[illegible]e" which is explicitly encompassed in the federal and state definitions of a cable television "franchise." The "license" sought by the Company should not be confused with the more limited definition of a "franchise" as that term is used in the New York City Charter. Nor is the company seeking a concession or revocable consent as those terms are used in the New York City Charter at §§ 362(A) and (D).

The Proper Procedure To Grant the Company a Cable Television License is set forth in 9 NYCRR Part 594

The Company is seeking a cable television license which the City is authorized to grant under federal and state cable television statutes. However, there is no procedure in the New York City Charter for the grant of a "cable television license."

The New York City Charter has a procedure for granting a "franchise" as that term is used in the New York City Charter. But the Company does not seek to use the public streets or rights of way and therefore does not need a "franchise" as that term is used in the New York City Charter. The Company only seeks authorization to install a cable television system

which does not use the City's inalienable property. The New York City Charter is silent on the procedure to be followed in granting such authorization.

However, Article 28 of the Executive Law and the implementing regulations of NYSCC do provide a procedure for the City to follow in granting the Company's application for a cable television license. Indeed, the City is required to follow the franchising procedures set forth in 9 NYCRR Part 594. It is the Company's view that the City should comply with these procedures in processing the Company's license application.

I direct you attention to 9 NYCRR § 594.9 which provides for the Alternative Franchising Procedure. Under this section, the City can be exempt from 9 NYCRR §§ 594.1 through 594.4 if it contacts all cable operators within a 25 mile radius and determines that only the Company is interested in providing the service proposed by the Company.

By this letter, I am requesting, on behalf of the Company, that the City proceed pursuant to 9 NYCRR § 594.9 to process the Company's application for a cable television license. You may regard this letter as an application by the Company for a cable television license for purposes of starting the Alternative Franchise Procedure.*

I respectfully ask the City to contact the cable operators described in 9 NYCRR § 594(b) and advise them that the Company is proposing to provide the cable television service described in this letter. We firmly believe that the City will readily determine that the Company is the only one interested (or indeed capable) of providing its proposed service in New York City. I would be glad to assist you in making these contacts, if you wish. Once the City has made this determination,

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* Our review of the New York City Charter indicates that the New York City Office on Telecommunications and Energy does have the authority--on behalf of the City--to process and grant the Company's cable television license application. See New York City Charter § 1070(B)(1); § 1070(B)(7); § 1070(C).

it should then seek the permission of the NYSCC Executive Director or General Counsel to be exempt from 9 NYCRR §§ 594.1 through 594.4.

The Company's Application is Not Subject to ULURP

Given the history of cable television franchises in the City and the role of the Uniform Land Use Review Procedure ("ULURP") in that process, it is appropriate to address whether ULURP applies to the Company's cable television license application. In our view it does not.

By the express terms of the New York City Charter, ULURP applies only to a "franchise" as that term is used in the New York City Charter. See New York City Charter § 197(C)(6). As previously discussed, the Company does not seek nor does it need such a "franchise." There simply is no provision in the New York City Charter which could conceivably require the application of ULURP to the Company's cable television license application. See New York City Charter § 197(c).

Moreover, any regulation by the City of the Company's satellite dish antennas through ULURP is pre-empted by the Federal Communications Commission regulation governing the installation of satellite dish antennas. See 47 CFR § 25.104 and *Cawley v City of Port Jervis,* 743 F.Supp. 128 (S.D.N.Y. 1990); *Van Meter v. Township of Maplewood,* 696 F.Supp. 1024 (D.N.J. 1986). The Company's satellite dish antennas are functionally no different than the many kinds of antennas already installed on roof tops in New York City including C-Band satellite antennas, microwave antennas and off-air broadcast antennas. ULURP has not been invoked to govern the installation of those antennas. There is no reason why the Company's antennas should be treated any differently, particularly when the New York City Charter does not expressly provide for it.

Conclusion

I have addressed a wide range of issues and would be glad to discuss them with you. Please feel free to call me if you

have any questions or need additional information. I would appreciate your processing the Company's cable television license application in the manner set forth in this letter and advise me on the next step.

Sincerely,

/s/ W. James MacNaughton
W. James MacNaughton

JM/CS

CC: D. Moro
W. Finneran
E. Kearse
J. Grow
J. Brilling

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* ULURP authorizes community board review only for the land use implications of cable television operations. *Starburst Realty Corp. v. City of New York*, 125 App. Div. 2d 148, 157 (1st. Dept. 1987), *motion for leave to appeal denied*, 70 NY 2d 605 (1988). You may want to confirm with the City Planning Commission that the Company's satellite dish antennas will not have land use implications that require the application of ULURP. Compare New York City Charter § 363(e).

EXHIBIT C

THE CITY OF NEW YORK
DEPARTMENT OF TELECOMMUNICATIONS
AND ENERGY
75 Park Place, 6th Floor
New York, New York 10007

William F. Squadron
Commissioner

Telephone: (212) 788-6540
Facsimile: (212) 788-6551

April 27, 1992

W. James MacNaughton, Esq.
Attorney at Law
90 Woodbridge Center Drive, Suite 610
Woodbridge, New Jersey 07095

Dear Mr. MacNaughton:

I write in response to the Russian American Broadcasting Company's ("RABC") request for a "license" to operate a satellite-delivered Russian language video and audio service in New York City.

Under the New York City Charter, no license is required from the New York City Department of Telecommunications and Energy ("DTE") in order for RABC to provide such service.

Because RABC does not intend to utilize the inalienable property of the City for either private or public purposes, neither a revocable consent nor a franchise is required. Assuming, without admitting, that RABC is a "cable system", there are no provisions of City law which empower DTE to authorize the operation of cable systems other than through a franchise as set forth in Chapter 14 of the New York City Charter.

Because we have determined that no license is required from DTE in order for RABC to provide its satellite service, we have chosen not to respond to the various legal interpretations

taken in RABC's "license application" regarding, among other things, the definition of a cable system, the City's right or obligation to grant franchises, the intent of Section 828 of Article 28 of the New York State Executive Law or Section 197c of the New York City Charter.

Thank you for your patience in this matter.

Sincerely,

/s/ Christopher Collins
Christopher Collins
General Counsel

cc: William F. Squadron
William Finneran
John Grow, Esq.
Jackie Brilling, Esq.

EXHIBIT D

NEW YORK STATE COMMISSION ON CABLE TELEVISION

94-336

In the Matter of

Petition of Time Warner Cable of New York City and Paragon Cable - Manhattan regarding the operations of Liberty Cable Company, Inc.	))))	DOCKET NO. 90460

ORDER TO SHOW CAUSE

(Released: August 23, 1994)

PLEASE TAKE NOTICE that a proceeding is hereby commenced against Liberty Cable Company, Inc. (hereinafter "Liberty") for the alleged operation of a cable television system in four separate locations in the City of New York, Borough of Manhattan, County of New York, without a franchise and certificate of confirmation therefor as required by Sections 819 and 821 of the Executive Law.

Section 819(1) of the Executive Law provides, in pertinent part, that "no cable television system, whether or not it is deemed to occupy or use a public thoroughfare, may commence operations or expand the area it serves . . . unless it has been franchised by each municipality in which it proposes to provide or extend service."

Section 821(1) of the Executive Law provides, in pertinent part, that "no person shall exercise a franchise and no such franchise shall be effective until the commission has confirmed such franchise."

On or about May 31, 1994, the Commission received from Time Warner Cable of New York City and Paragon Cable - Manhattan (hereinafter "Time Warner" and "Paragon," respectively) a [request] for investigation of the provision of cable television service to residents of multiple dwelling

buildings without a franchise or certificate of confirmation. Time Warner and Paragon alleged that Liberty is providing cable television service to residents of buildings located at or near: 229 East 79th Street; 535 East 86th Street; 420 East 54th Street (a/k/a River Tower) and 60 Sutton Place South; and 12 West 96th Street. Liberty has not obtained a franchise or certificate of confirmation for any of these locations.[1]

On or about June 28, 1994, Liberty responded by its attorney, W. James MacNaughton. In its response, Liberty admitted that in some locations it has placed cable between residential buildings. Liberty did not identify specific locations. The company did indicate that the buildings located at 525 and 535 East 86th Streets were both managed by Kreisel Management.

Since receiving the petition of Time Warner and Paragon, staff from the Commission's Telecommunications Division conducted site inspections at two locations in Manhattan which were identified in the petition of Time Warner and Paragon. Specifically, on July 29, 1994, staff inspected premises at, and in the immediate vicinity of, 239 East 79th Street and 12 West 96th Street.

At 239 E. 79th Street, staff observed a coaxial cable running from the roof of the building across an alleyway to the rear of 232 East 80th Street. The same wire was attached to several buildings and lashed to Time Warner cable as it runs to the back of a parking garage situated 79th and 80th Streets at the corner of those blocks. At 12 West 96th Street, staff observed the interconnection of the building with 44 West 96th

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[1] Time Warner and Paragon operate franchised cable television systems in the City of New York. Said franchises were renewed by the City on June 27, 1990 and approved by this Commission on August 8, 1990 (*Application of Manhattan Cable Television, Inc. for approval of a renewal of a franchise for the City of New York (Borough of Manhattan)*, Docket No. 30711, Order No. 91-060; *Application of Paragon Cable Manhattan for approval of a renewal of a franchise for the City of New York (Borough of Manhattan*, Docket No. 80712, Order No. 91-060.

Street by a single wire running along the rooftops of intervening buildings. This wire was also observed alongside or lashed to the wire of the franchised cable company. From information obtained during the course of the inspection, staff understood the wire at both locations to belong to Liberty Cable.

Federal law defines a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . ." 47 USCA § 522(7). This definition excludes "a facility that serves subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." 47 USCA § 522(7)(B). It appears from our staff's investigation that Liberty is a "cable system" by definition. Moreover, it appears that Liberty's service at the locations described in this Order does not fall within the exception for a Satellite Master Antenna Television (SMATV) in 47 USCA § 522(7)(B).

THE COMMISSION ORDERS:

1. Liberty is hereby directed to Show Cause, in writing, by not later than September 18, 1994, why it should not be determined to be a cable television system subject to the requirements of Article 28 of the Executive Law, including the requirements for a franchise from the City of New York and a certificate of confirmation from the Commission; *or, alternatively*, why it should not be compelled to remove all interconnections by wire of buildings not commonly owned, controlled or managed and be ordered to and cease and desist from the provision of cable television service by means of such wires, whether now or in the future, to buildings not under common ownership, control or management, or on any public right-of-way and from providing service in any manner inconsistent with state and federal law until such time as

Liberty shall have obtained a franchise and certificate of confirmation in accord with state law.

2. Liberty is entitled to an opportunity to be heard on the allegations herein and may avail itself of such opportunity by filing with the Commission on or before September 18, 1994 a written notice of appearance stating that it will appear at a hearing and present evidence as specified in this order. If the company fails to file an appearance within the time specified or, to respond in writing to the allegations herein, a final order shall be entered in this proceeding.

Commissioners Participating: William B. Finneran, Chairman; Gerard D. DiMarco, Barbara T. Rochman, David F. Wilber, III, Commissioners

EXHIBIT E

L.U. 63, AS AMENDED (Resolution No. 1639)

Resolution authorizing the Department of Telecommunications and Energy to grant franchises for the provision of cable television services.

By Council Members Eisland and McCaffrey, (by the request of the Mayor); also Council Members Cruz and Foster.

WHEREAS, by Executive Order No. [8] *44*, dated [April 12, 1990] *December 3 1992*, the Mayor has designated the Department of Telecommunications *and Energy* as the responsible agency for the granting of telecommunications franchises; and

[WHEREAS, pursuant to Local Law 71 of 1990, the Department of Telecommunications became the Department of Telecommunications & Energy; and]

WHEREAS, pursuant to Section 363 of the Charter ("the Charter") of the City of New York ("the City"), the Commissioner of the Department of Telecommunications and Energy *(the "Commissioner")* has made the initial determination of the need for franchises for cable television services; and

WHEREAS, the Council has determined that the granting of such franchises will promote the public interest, increase access to information, enhance the health, welfare and safety of the public and stimulate commerce by assuring the universal availability and effective provision of cable television services throughout the entire City of New York;

The Council hereby resolves that:

The Council authorizes the Department of Telecommunications and Energy to grant non-exclusive franchises for the provision of cable television services and the installation of cable television facilities and associated equipment on, over, and under the inalienable property of the City of New York.

The public service to be provided under such franchises shall be "cable service" as defined by Section 602(5) of the Cable Communications Policy Act of 1984, 47 USC 522 *as amended.*

For purposes of this resolution, "inalienable property of the City" shall mean the property designated as inalienable in Section 383 of the Charter.

All franchises granted pursuant to this resolution shall require the approval of the Franchise and Concession Review Committee and the separate and additional approval of the Mayor.

The authorization to grant franchises pursuant to this resolution shall expire on the fifth anniversary of the date on which this resolution is adopted by the Council (the "Expiration Date"). No franchise shall be granted pursuant to this resolution by the Department of Telecommunications and Energy, nor approved by the Franchise and Concession Review Committee, or the Mayor after the Expiration Date.

Prior to the grant of any such franchise, a Request for Proposals ("RFP") or other solicitation shall be issued by the Department of Telecommunications and Energy. *Prior to issuing any such RFP or other solicitation, all necessary environmental and land use review shall be conducted in accordance with the New York State Environmental Quality Review Act ("SEQRA"), the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 et. seq., the City Environmental Quality Review ("CEQR") Rules of Procedure of 1991, Executive Order No. 91 of 1977 and Section 197c of the Charter.* The criteria to be used by the Department of Telecommunications and Energy to evaluate responses to such RFPs or other solicitations shall include, but not be limited to, the following:

(1) the adequacy of the [proposed] compensation to be paid to the City;

(2) the financial, legal, technical and managerial experience and capabilities of the applicant(s);

(3) the ability of the applicant(s) to maintain the property of the City in good condition throughout the term of the franchise; [and]

(4) the efficiency of the public service to be provided[.]*; and*

(5) the impact, if any, on existing franchises and the services provided thereunder.

The Department of Telecommunications and Energy shall apply the City's [Anti-Apartheid policies] *MacBride principles* [in the selection of franchisees] *when granting a franchise pursuant to this resolution.*

Any franchise granted pursuant to this authorizing resolution shall be by written agreement which shall include, but not be limited to, the following terms and conditions:

(1) the term of the franchise *including option(s) to renew, if any,* shall not exceed ten (10) years;

(2) the compensation to be paid to the City shall be adequate and [may] *shall* include the payment of fees or the provision of facilities [or] *and* services, or both. *Such compensation shall not be considered in any manner to be in the nature of a tax, but such payments shall be made in addition to any and all taxes of whatsoever kind or description which are now or may at any time hereafter be required to be paid pursuant to any local law of the City, law of the State of New York, or law of the federal government*;

(3) the franchise may be terminated or canceled *by the Commissioner* in the event of the franchisee's failure to comply with the *material* terms and conditions of the agreement;

(4) a security fund shall be established to ensure the performance of the franchisee's obligations under the agreement;

(5) the City shall have the right to inspect the facilities of the franchisee and to order the relocation of such facilities at the direction of the Department of Telecommunications and Energy;

(6) there shall be adequate insurance and indemnification requirements *to protect the interests of the public and the City;*

(7) all franchisees shall be required to maintain complete and accurate books of account and records which shall be made available on demand to the City for inspection;

(8) the franchisee shall be required to maintain an office in the City where the above books and records shall be maintained and where the franchisee's accounting, billing and clerical functions pertaining to the franchised operations shall be performed;

[(8)] *(9)* there shall be provisions to insure quality [workmanship] *work* and construction methods;

(10) all franchisees shall comply with all applicable sections of the building and electrical codes of the City of New York and where the nature of any work to be done in connection with the installation, construction, operation, maintenance, repair, removal, or deactivation of cable television facilities and associated requirement on, over, and under the inalienable property of the City requires that such work be done by an electrician, the franchisees shall employ and utilize only licensed electricians;

[(9)] *(11)* there shall be provisions containing the agreements required pursuant to paragraph 6 of subdivision (h) of Section 363 of the Charter relating to collective bargaining and other matters;

[(10)] *(12)* there shall be provisions requiring the franchisee to comply with City laws, regulations and policies [related to] *concerning*, but not limited to, employment, purchasing and investigations;

[11)] *(13)* there shall be provisions to ensure adequate oversight and regulation of the franchisee by the City;

[(12)] *(14)* there shall be provisions to restrict the assignment or other transfer of the franchise without the prior written consent of the City *and provisions to restrict changes in*

control of the franchisee without the prior written consent of the City;

[(13)] *(15)* there shall be remedies to protect the City's interests in the event of the franchisee's failure to comply with the terms and conditions of the agreement;

[(14)] *(16)* there shall be provisions to require all franchisees to submit to the City's Vendor Information Exchange System ("VENDEX") and the Integrated Comprehensive Contract Information System ("ICCIS");

[(15)] *(17)* there shall be provisions to ensure that cable service provided under any such franchise be "state-of-the-art". *"State-of-the-art" shall mean that level of technical or service performance, capacity and capability (including, but not limited to, plant or other equipment, access and other production equipment or facilities; construction techniques; consumer service; facilities, equipment, systems and operations; and performance standards) which has been developed and demonstrated to be workable in the cable industry, or any other comparable industry that provides services to the public under similar conditions, and is "Economically and technically feasible and viable" from time to time throughout the term of the franchise. "Economically and technically feasible and viable" shall mean capable of being provided: (i) through technology which has been demonstrated to be feasible for its intended purpose; (ii) in an operationally workable manner; and (iii) in a manner which ensures that the system has a reasonable likelihood of being operated on a reasonably profitable basis over the term of the franchise;*

[(16)] *(18)* there shall be provisions to ensure that cable service provided under any such franchise be made available to all persons residing in that portion of the City covered by such franchise;

[(17)] *(19)* there shall be provisions to insure the prompt and efficient resolution of all consumer complaints;

[(18)] *(20)* there shall be provisions to insure the carriage of channel capacity for public, educational and governmental purposes and for commercial use;

[(19)] *(21)* there shall be provisions to protect the City's interests in the event of the subsequent invalidity of any portion of the agreement and in the event of any change in applicable law;

[(20)] *(22)* there shall be provisions to encourage competition in the cable television industry in the City of New York;

[(21)] *(23)* there shall be provisions to require all franchisees to obtain all necessary licenses and/or permits from and to comply with all Rules and Regulations of the New York State Commission on Cable Television, the Federal Communications Commission and any other governmental body having jurisdiction over the franchisee;

[(22)] *(24)* there shall be provisions preserving the right of the City to perform public works or public improvements in and around those areas covered by the franchise;

[(23)] *(25)* there shall be provisions requiring the franchisee(s) to protect the property of the City and the delivery of public services from damage or interruption of operation resulting from the construction, operation, maintenance, repair, removal or deactivation of the equipment and facilities related to the franchise;

[and,]

[(24)] *(26)* there shall be provisions designed to minimize the extent to which the public use of the streets of the City is disrupted in connection with the construction, operation, maintenance, repair, removal or deactivation of the equipment and facilities related to the franchise[.];

(27) in order to ensure the rational and orderly administration of cable television franchises, and the availability of service under each franchise to a substantial number of persons, no franchise agreement shall be entered into unless the

area covered by the franchise includes at least one entire community board district and covers an area which includes at least 30,000 (thirty thousand) households (according to 1990 census data);

(28) with respect to any franchise granted pursuant to this resolution and covering part or all of the Bronx, Brooklyn, Staten Island or Queens, the terms and conditions of the franchise shall, to the extent practical and consistent with the goal of achieving competition in the provision of franchised cable television service in the City, be such that no cable television franchisee holding an existing cable television franchise covering part or all of the Bronx, Brooklyn, Staten Island or Queens on the effective date of this resolution would be entitled to a modification of its franchise agreement pursuant to Section 7.6 or its existing franchise agreement, (the provisions of this subsection (28) shall not be construed to limit any rights which the franchisee under such an existing franchise agreement may have pursuant to such existing franchise agreement and;

(29) with respect to any franchise granted pursuant to this resolution and covering part or all of Manhattan, the terms and conditions of the franchise shall, to the extent practical and consistent with the goal of achieving competition in the provision of franchised cable television service in the City, be such that no cable television franchisee holding an existing cable television franchise covering areas of Manhattan on the effective date of this resolution would be granted a modification of its franchise pursuant to Section 15.4.05 of its existing franchise agreement (the provisions of this subsection (29) shall not be construed to limit any rights which the franchisee under such an existing franchise agreement may have pursuant to such existing franchise agreement).

The Department of Telecommunications and Energy shall file with the Council the following documents:

(1) within fifteen (15) days of filing or receipt, a copy of all missives including but not limited to, forms, applications,

reports and correspondence regarding ULURP, SEQRA, and CEQR;

[(1)] *(2)* within fifteen (15) days of issuance, a copy of each RFP or other solicitation issued pursuant to this resolution;

[(2)] *(3)* within fifteen (15) days of approval by the Mayor, a copy of the agreement for each franchise granted pursuant to this resolution; and

[(3)] *(4)* on or before July 1 of each year, a report detailing the revenues received by the City from each franchise granted pursuant to this resolution during the preceding calendar year.

Adopted.

Office of the City Clerk, }
The City of New York, } ss .:

I hereby certify that the foregoing is a true copy of a Resolution passed by The Council of The City of New York on October 13, 1993, on file in this office.

/s/.....
City Clerk, Clerk of Council

EXHIBIT F

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

In the Matter of

Petition of Time Warner Cable of New York City and Paragon Cable - Manhattan regarding the operations of Liberty Cable Company, Inc.	))))	DOCKET NO. 90460

NOTICE OF HEARING
(Released: November 18, 1994)

On or about May 31, 1994, Time Warner Cable of New York City and Paragon Cable-Manhattan (hereinafter "TWCNYC") filed a complaint with this Commission against Liberty Cable Company, Inc. (hereinafter "Liberty") alleging illegal operation of a cable system. On July 29, 1994, Commission staff conducted site inspections at two locations in Manhattan where coaxial cable was observed connecting a building with a rooftop microwave reception antenna to at least one other building within the same block. On August 23, 1994, the Commission released an Order to Show Cause in this docket (Order No. 94-336) commencing this proceeding against Liberty for the alleged operation of one or more cable television systems in the Borough of Manhattan of the City of New York without a franchise and certificate of confirmation in contravention of Sections 819 and 821 of the New York State Executive Law.[1]

The Show Cause Order directed Liberty to demonstrate that it was not operating cable television systems at the said loca-

[1] Federal statute also prohibits the operation of a cable television system without a franchise with two exceptions. 47 USC Section 541(b)(1). The exceptions are (1) the lawful provision of cable service without a franchise on or before July 1, 1984 where a franchising authority has not subsequently required a franchise and (2) the provision of cable service by a municipality or municipal authority. Neither exception appears to apply to Liberty Cable.

tions or, why it should not be compelled to remove all interconnected physical transmission lines until such time as it obtained a franchise and certificate of confirmation.

On November 1, 1994, Liberty filed an Answer and Appearance in this docket. It denied any wrongdoing but it admitted the interconnection of buildings by wire at certain locations in the City of New York including the locations cited in the Commission's Order to Show Cause. It claimed that such operations are not unlawful pursuant to state and federal law, and requested a hearing.

On November 7, 1994, TWCNYC filed an Appearance and Reply to Liberty's Answer wherein it concurred with Liberty's request for an evidentiary hearing but opposed any delay in the scheduling of that hearing.

In addition to the allegation of illegal operation, TWCNYC and Liberty both allege that the other has engaged in anticompetitive conduct. TWCNYC alleges anticompetitive conduct by Liberty with reference to access and landlord inducements. In its Answer, Liberty refers generally to the "anticompetitive tactics" of TWCNYC.

In view of the request for a hearing by Liberty, the concurrence by TWCNYC, and in the interest of fairness, we have determined to hold a hearing on December 9, 1994 at 12:30 p.m. at the Commission's offices on the 21st Floor of the Corning Tower Building, Empire State Plaza in Albany, New York, or at such other adjourned time and place as deemed appropriate. We will receive documentary evidence and sworn testimony on the issues raised in the various papers and pleadings filed herein, particularly with reference to whether Liberty is illegally operating a system or systems at the referenced locations, and as to such further issues as seem relevant and appropriate.

We have determined that the City of New York by its Department of Information Technology and Telecommunications is an interested party to this proceeding and, as such, has been invited to appear and testify.

Witnesses will be sworn, testimony recorded, and the hearing held *en banc* by the Commission. Our Counsel is authorized to seek stipulations from the parties as to fact and law, and to seek briefing and statements in advance as to relevant facts and issues. Parties may request additional time for briefing following the hearing.

SO ORDERED.

EXHIBIT G

MR. MacNAUGHTON: And if what you want to do is hear more on that subject, then tell me and I will make that presentation.

COMMISSIONER ROCHMAN: Well --

CHAIRMAN FINNERAN: We're going to take a five-minute break, and we urge you to return in exactly five minutes.

[A recess was taken from 2:33 PM to 2:49 PM.]

CHAIRMAN FINNERAN: I move that the commission order an immediate standstill requiring that Liberty establish no additional cable or other closed transmission interconnections of buildings not commonly owned, controlled or managed; that Liberty shall not energize any new subscribers through such hard-wired interconnected buildings to which service is not currently being provided unless under common management, control or ownership;

That such standstill be in effect until vacated by this commission;

And finally, that within ten days Liberty provide to this commission a listing of all buildings throughout the five boroughs that have hard-wired interconnection and an indication of such where an exemption is intended to be claimed because of common ownership, management or control and the nature of such claim.

MR. PASSIDOMO: Mr. Chairman, would you make that into three separate motions?

CHAIRMAN FINNERAN: Yes. Let's assume that that will be divided into three separate motions:

That there will be immediate standstill; again, requiring no additional cable or closed transmission interconnections of buildings not commonly owned, controlled or managed; that where service is not currently being provided, that no new

subscribers be serviced through such hard-wired interconnection absent common ownership, control or management;

That such standstill be in effect until vacated by this commission.

I move that within ten days Liberty provide a listing to this commission of all hard-wired interconnected buildings throughout the five boroughs with an indication of which of these interconnections there is intended to be asserted an exemption because of common ownership, control or management.

I so move.

MR. PASSIDOMO: I second the motion.

CHAIRMAN FINNERAN: Chairman Finneran, yes.

COMMISSIONER ROCHMAN: Yes.

COMMISSIONER PASSIDOMO: Yes.

MR. KEARSE: Yes.

CHAIRMAN FINNERAN: The evidentiary phase will be conducted, as we earlier indicated, probably in New York City by Mr. Kearse. Notification as to time and place of such will be forwarded to the parties of interest.

There being no further business before this --

MR. SCHWARTZ: Could I just have a point of clarification?

CHAIRMAN FINNERAN: Please.

MR. SCHWARTZ: Was that vote on all three of the motions, or is there --

CHAIRMAN FINNERAN: Yes, it was. There was immediate standstill, the extent of it in terms that it is in place until such time as is vacated by the commission, and that the disclosure within ten days as I indicated.

MR. PASSIDOMO: Why don't we take each motion at a time so that there will be no question.

MR. GROW: If there is no objection to it--

CHAIRMAN FINNERAN: There being no objection, each of those will be separately approved.

MR. PASSIDOMO: Fine.

CHAIRMAN FINNERAN: There being no objection. Okay.

There being no further business before the commission, we thank you, one and all.

MR. MacNAUGHTON: Thank you.

[At 2:54 PM the proceeding was adjourned.]

RE: Time Warner Cable, Paragon Cable-Manhattan and Liberty Cable

AT: Albany, New York

ON: December 9, 1994

CERTIFICATE

I, JOANNE M. DeSTEFANO, Notary Public and Certified Shorthand Reporter in the State of New York, do hereby certify that I recorded stenographically the proceedings in the foregoing matter at the time and place noted in the heading hereof and that the foregoing is a true and correct transcript thereof, to the best of my knowledge and belief.

/s/

Joanne M. DeStefano

Certified Shorthand Reporter

EXHIBIT H

The City of New York

DEPARTMENT OF INFORMATION TECHNOLOGY
AND TELECOMMUNICATIONS

75 Park Place, 6th Floor
New York, N.Y. 10007

December 9, 1994

VIA FACSIMILE

Hon. William B. Finneran
Chairman
New York State Commission of Cable Television
Tower Building, Empire State Plaza
Albany, New York 12223

Re: *Petition of Time Warner Cable of New York City and Paragon Cable Manhattan Regarding the Operations of Liberty Cable Company, Inc. - Docket No. 90460*

Dear Chairman Finneran:

This is to apprise the New York State Commission on Cable Television ("Commission") that the City of New York is unable to make an appearance at today's hearing in the above-referenced proceeding.

In the Hearing Notice, dated November 18, 1994, the Commission stated that "[w]e have determined that the City of New York by its Department of Information Technology and Telecommunications is an interested party to this proceeding and, as such, has been invited to appear and testify." In a letter dated December 5, 1994, John Grow, Counsel, noted that "the Commission will expect that ... the City of New York address the alleged pending discussions concerning the ptoential franchising of Liberty Cable" at the hearing.

The Department of Information Technology and Telecommunications currently is considering various issues affecting

cable system franchising in the City, and we are unable to testify as to these deliberations at this time.

Very truly yours,

/s/Thomas J. Dunleavy
Thomas J. Dunleavy
First Deputy Commissioner

cc: John Grow, Esq.
W. James MacNaughton, Esq.
Martin J. Schwartz, Esq.

DEPARTMENT OF INFORMATION TECHNOLOGY
AND TELECOMMUNICATIONS

75 Park Place, 6th Floor
New York, N.Y. 10007

Telephone: (212) 788-6548
Facsimile: (212) 788-6551

Thomas J. Dunleavy
First Deputy Commissioner

TELECOPIER
(212) 788-6551

TELECOPIER COVER PAGE

Page 1 of 2 Pages Date: December 9, 1994

NAME:	W. James MacNaughton, Esq.
FAX NO.:	(908) 634-7499
RE:	Docket No. 90460
FROM:	Thomas J. Dunleavy

MESSAGE: To L. Constantine

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBERTY CABLE COMPANY, INC., SIXTY SUTTON CORP. and JACK A. VEERMAN,	:	94 Civ. 8886 (LAP)
Plaintiffs,	:	
v.	:	
THE CITY OF NEW YORK and RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, THE NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DI MARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO,	:	**THIRD AFFIDAVIT OF PETER O. PRICE**
Defendants,	:	
- and -	:	
THE UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY and PARAGON CABLE MANHATTAN,	:	
Defendants-Intervenors.	:	

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

PETER O. PRICE, being duly sworn, deposes and says that:

1. I am the President of Plaintiff Liberty Cable Company, Inc. ("Liberty") and an attorney duly admitted to practice law. I make this affidavit in further support of Liberty's motion for a preliminary injunction. In particular, I wish to address the rulemaking proceeding initiated by New York City on February 21, 1995 concerning "Off Street" cable franchising.

2. It is my understanding that Assistant Corporation Counsel, Lewis Finkelman, represented to this Court that certain aspects of the proposed Off-Street franchise were subject to change, but that others were fixed and mandatory. In particular, Mr. Finkelman advised the Court that, at a minimum, Liberty would be required to obtain a franchise which encompassed the entire Community District in which Liberty served a single subscriber in a Non-Common System.

3. Now that this minimum mandatory provision of the City's *future* Off-Street franchise is known, I can add this to the list of those known minimum mandatory burdens which Liberty is definitely subject to as a "cable system" by operation of the "challenged "common ownership" requirement of 47 USC. §§522 (7) and 541.

4. Although the City has added this burden to the lengthy list of mandatory burdens imposed on a federally defined "cable system" by operation of federal and state law, I hasten to respectfully remind the Court that Liberty cannot yet apply for this franchise. Mr. Finkelman candidly told the Court that the rulemaking procedure does not require that the final Off-Street franchise rule be promulgated within any time limit.

5. However, when and if the final Off-Street franchise rule is promulgated, the known mandatory minimum burdens

imposed on Liberty by operation of the challenged common-ownership requirement include but are not limited to those described below. In this affidavit, I will explain how some of these known mandatory minimum burdens impact upon Liberty.

6. Liberty's video systems have a 72-channel capacity. This is dictated by Liberty's 18 ghz microwave licenses and its 18 ghz microwave equipment.

7. Liberty currently utilizes 71 of its 72 channel capacity. Seventy channels are available for Liberty's network and two channels are currently reserved for individual use by buildings as security channels and/or building bulletin boards.

8. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, these obligations will include certain channel allocation requirements. Among these mandatory channel allocation requirements are "must-carry", *see*, 47 U.S.C §§ 534 and 535, "leased access," *see*, 47 U.S.C. § 532, and public, educational and government ("PEG") channels, *see*, 47 U.S.C. § 531, Executive Law § 829(3) and 9 N.Y.C.R.R. § 595. This means that Liberty will have to remove at least eight and as many as 24 channels of its current programming from the system to make channel capacity available to comply with these mandatory requirements. In addition, Liberty also will have to give up its last remaining unused channel to meet these requirements. This represents at least 13% and as much as 33% of Liberty's channel capacity.

9. Compliance with the channel allocation requirements will cause a *decrease* in the diversity of programming now available to Liberty's subscribers. Liberty will, by operation of law, have to delete eight to 24 channels of its existing programming - some of which is not offered by Time Warner -- to duplicate the same must-carry leased access and PEG channels that are currently offered by Time Warner.

10. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum

obligations imposed on a cable system, Liberty will have to carry local commercial broadcast stations pursuant to 47. U.S.C. § 535 -- the so-called "must-carry stations." A list of the must-carry stations which Liberty could be required to carry is annexed as Exhibit A. All of the must-carry stations are carried at the option of the broadcast station. *See* 47 U.S.C. § 534(a). Any broadcast station requesting must-carry must meet certain requirements for signal strength, copyright liability and non-duplication which are solely within the control of the must-carry station. *See*, 47 U.S.C. § 534(h)(1)(B). Thus, the must-carry stations, not Liberty, control whether they will be included in Liberty's program offering.

11. Liberty currently offers some, but not all, of the must-carry stations because Liberty's customers have requested that programming. However, Liberty's customers never or rarely request the must-carry stations Liberty does not carry and, accordingly, Liberty does not offer that programming.

12. Liberty can comply with the must-carry obligation only by making channel capacity available on at least two and as many as seven channels. This will require Liberty to delete at least one and as many as six channels of existing programming as well as dedicate its last remaining unused channel for a must-carry station. Thus, in order to meet the must-carry obligation, Liberty will be forced to delete programming such as UNTV, CNN International, and 24 hour Bloomberg News. These unique program offerings are an important reason why certain subscribers chose Liberty Service over cable service from its competitors'. For example, Liberty's subscribers in the Non-Common System at 860 and 866 UN Plaza include many diplomats and three foreign United Nations missions. For these subscribers, UNTV is a primary motivation to subscribe to Liberty's service. Similarly, Liberty serves an area of Roosevelt Island where approximately 30% of the residents work for the United Nations or one of its delegation or missions.

13. Upon information and belief, Time Warner carries all of the must-carry stations that have requested and are

currently eligible for carriage pursuant to 47 U.S.C. §§ 534(a) and 535. All of the residents in buildings served by Liberty's Non-Common Systems currently have the opportunity to receive all of the mandatory must-carry stations by simply subscribing to Time Warner's service. Some in fact do so. However, imposing the must carry obligation on Liberty will decrease the programming choices available to those residents -- not increase their choices. The imposition of the must-carry obligation on Liberty will force Liberty to reduce the diversity of its current program offering in order to duplicate Time Warner's offering of mandatory must-carry stations. Liberty's subscribers will lose at least one and as many as six channels from their current programming and the one Liberty channel not yet programmed. They will gain nothing in return except a duplication of the mandatory must-carry stations. The government -- not the citizen -- will then determine which programming comes into the home.

14. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, Liberty will have to allow the use by third parties of leased access channels pursuant to 47 U.S.C. § 532. Liberty will have to set aside at least four and as many as nine channels to fulfill the leased access requirement. As with the imposition of the must-carry obligation, Liberty will have to delete programming such as CNN International, Turner Classic Movies, Bloomberg Information TV and UNTV, which are not offered by Time Warner and are desired by Liberty's subscribers.

15. Time Warner provides four leased access channels according to the Affidavit of Richard Aurelio sworn to January 13, 1995. Liberty subscribers have the opportunity to receive Time Warner's leased access channels if they wish. As with the imposition of the must-carry obligations, the imposition of the leased access requirement merely duplicates existing channels and will result in a decrease of programming choices available to Liberty's subscribers rather than an increase.

16. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, Liberty will be required to carry certain PEG channels. Time Warner offers five PEG channels, which are programmed with "Crosswalks." The City has proposed to utilize some of this public educational and governmental channel capacity to facilitate video Off-Track Betting. Attached as Exhibit B is a *New York Times'* article reporting this City proposal.

17. Liberty will also have to provide channel capacity to deliver "locally originated" programming pursuant to 9 N.Y.C.R.R. Section 596.10. This will further reduce Liberty's ability to program its remaining channels with its own selection of programming. Again, as with must-carry and leased access, Liberty's programming will become less diverse and more duplicative of Time Warner's programming.

18. Taking all of the channel capacity requirements together, must-carry, leased access, PEG and local origination, imposed by the existing federal and state mandatory franchise requirements, Liberty will have to remove at least eight channels and as many as 24 channels of its existing programming plus give up its last unused channel because it has run cable on private property between two buildings which seek its service. In the case of 860 and 866 UN Plaza, the Non-Common System serves a single building. Liberty's subscribers already have the option to take those government-mandated channels from Time Warner, if they wish but have chosen not to do so. Thus, the channel allocation requirements imposed by law will actually and significantly reduce the diverse programming choices currently available to Liberty's subscribers and other residents of building served by Liberty.

19. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, Liberty will, according to the City of New York, have to provide cable service to all the residents of a Community District in which Non-Common Systems are located. Attached as Exhibits C, D, E

and F are maps and charts showing Community Districts 5, 6, 7 and 8, including their population, households, numbers of separate residences and Liberty's current subscribers in Non-Common Systems as well as Stand-Alone and Common Systems.

20. Liberty estimates that the cost of building an "Off-Street franchise, as envisioned by the City of New York, will be at least $500 per household. If Liberty obtains the franchises for just these four Community Districts, it will have to arrange financing of at least $191,625,000.00 to meet the franchise construction requirements in just those districts. In Community District 5, Liberty currently serves only three subscribers in a Non-Common system but would be required to obtain a franchise for the entire District to continue serving these three subscribers.

21. There is no assurance that Liberty will be able to obtain necessary "line of sight" to serve all the buildings in a Community District for which it obtains an "Off-Street" franchise. Moreover, Liberty will, prior to getting the franchise, have to arrange for the financing and complete a construction plan satisfactory to the City.

22. Even though after 25 years, Time Warner still has not provided cable television service to all residents within its franchise areas, within one year, Liberty will have to provide service to "a significant number of subscribers" pursuant to 9 N.Y.C.R.R. Part 595.1(b).

23. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, Liberty will be precluded by operation of 47 U.S.C. § 532(a)(2) and 47. C.F.R. § 76.501(e)(2) from continuing to own and operate its Stand-Alone and Common Systems in those franchise areas (the "SMATV Cross-Ownership Restriction"). (Liberty was not a "cable operator" with a "franchise area" in October, 1992.) These SMATV systems, even though clearly not "cable systems" within the meaning of 47 U.S.C. § 522(7) and therefore not subject to the franchise requirement, will, by operation of

the SMATV Cross-Ownership Restriction, have to comply with all the mandatory minimum burdens imposed upon a cable system, including receiving the same programming as Liberty must provide to its "franchised" subscribers. Liberty's otherwise exempt SMATV systems will be required by law to either cease its SMATV operations or delete the same programming at its SMATV systems that it must delete to serve its "franchised" subscribers. Liberty's otherwise exempt SMATV systems will also be subject to rate regulation, the payment of franchise fees and all of the other mandatory obligations imposed on cable systems.

24. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, Liberty will have to provide lock out devices pursuant to 47 U.S.C. § 544(d)(2) to facilitate subscriber self censorship. Liberty does not currently offer the leased access programming which necessitates the lock out devices, but would be required to it if it is treated as a cable system by operation of the challenged provisions. Liberty estimates the cost of providing lock out devices to be at least $25 per subscriber and perhaps as much as several hundred dollars per subscriber. This requirement alone will impose an estimated cost of at least $625,000 just to provide lock out devices to Liberty's existing subscribers because Liberty will be forced to transmit programming which Liberty's subscribers have already opted not to receive.

25. If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, Liberty must charge uniform rates pursuant to 47 U.S.C. § 543(d), i.e., the same rates must be offered to subscribers within the franchise area. Liberty's rates are lower than its franchised competitors but it has different rates in different systems. These rates vary primarily because Liberty commenced service in different places at different times.

26. Liberty will be unable to flexibly and competitively price its programming. This will decrease Liberty's ability to

compete in a market dominated by an entrenched monopolist, Time Warner. The FCC First Report annexed to my affidavit of February 21, 1995 details the entrenched monopoly position of Liberty's competitors and the barrier to competition which the challenged common-ownership requirement erects. Liberty provides its video programming service to subscribers without the use of public property. Liberty challenges the common-ownership requirement because under this requirement it is subjected to a package of mandatory minimum burdens which infringes its rights and the rights of its subscribers to engage in protected speech activity. My statement has discussed only a few of the mandatory minimum burdens which are part and parcel of this assertedly unconstitutional provision of federal law.

New York, New York

PETER O. PRICE

Sworn to before me this

3rd day of March, 1995.

/s/

Notary Public

Robert L. Begleiter
Notary Public, State of New York
No. 41-4507247
Qualified in Queens County
Commission Expires March 30, 1996

EXHIBIT A

MUST CARRY STATIONS WHICH LIBERTY WOULD HAVE TO OFFER AT THE DISCRETION OF THE STATION

Commercial Broadcast

Call Letter	Broadcast Channel
WCBS[1]	2
WNBC[1]	4
WNYW[1]	5
WABC[1]	7
WOR[1]	9
WPIX[1]	11
WHAI	43
WTBY	54
WLIG[2]	55
WTZA[2]	62
WMBC[2]	63
WHSE[2]	68

Non-Commercial Broadcast

Call Letter	Broadcast Channel
WNET[1]	13
WLIW[1]	21
WNYE[1]	25
WNYC[1]	37
WXTV[1]	41
WNJU[1]	47
WNJN[2]	50

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[1] Carried by Time Warner and Liberty.

[2] Carried by Time Warner only.

EXHIBIT B

The New York Times
Saturday, February 18, 1995
Page D 25

Gambling on the Horse Races on Cable Television? You Bet!

By Steven Lee Myers

On some of the more obscure cable channels, New York City offers an eclectic but often dry mix of television programming – from meetings of the City Planning Commission to training for firefighters to lessons in English. Now, Mayor Rudolph W. Giuliani plans to add something he hopes viewers will find more enticing: horse racing.

What's more, viewers will be able to bet on the races over the telephone from the comfort of their homes: a sort of home-gambling network.

The plan is part of an experiment authorized last summer by the State Legislature that allows the New York Racing Association and the state's six Offtrack Betting Corporations to broadcast racing on local cable systems and accept wagers over the phone.

The administration hopes that televising races will stimulate flagging profits at the city's Offtrack Betting Corporation, as well as add an estimated $12 million a year to the city's coffers. It could also help boost the market value of OTB, which the Mayor has been planning to sell after it began losing money.

Deputy Mayor John S. Dyson, who is overseeing the project, said yesterday that the channel could be viewed in the city's 1.3 million homes with cable as soon as next week. In order to bet, viewers will have to have opened a special account in one of the city's OTB parlors.

Using five and a half hours of daily programming provided by the New York Racing Association, the betting corporations

in Nassau and Suffolk Counties began racing on cable on Thursday. The corporation in the Albany region began yesterday.

The Mayor's plan already has its critics. Gene Russianoff, senior attorney for the New York Public Interest Research Group, an advocacy group, questioned the decision.

Under the City Charter, he noted, the city must set aside channels for public affairs as part of its franchises with cable companies. Those channels, produced by Crosswalks and appearing on Channels 71 through 75 in all five boroughs, televise such things as meetings of the City Council, the Board of Education and the Metropolitan Transportation Authority. "A fair question to ask is: Are showing horse races and helping people bet away from the track a government use?" Mr. Russianoff said.

Mr. Dyson said the system would include safeguards, including the requirement that bettors open accounts with OTB and the ability of parents to block the racing channel through their cable company.

The Legislature allowed the home telecasts only until May 15, after which it will review the experiment. Assemblyman Joseph Crowley, a Democrat from Queens, who serves on the Assembly's Racing and Wagering Committee, said yesterday that the interest in the cable telecasts made it more likely that the experiment could be extended or made permanent.

EXHIBIT C

HOUSING CHARACTERISTICS FOR COMMUNITY DISTRICT 5
(Based on 1990 Census)

Total Population	*43,507
Total Households	*23,783
Total Housing Units	*30,350
Current Residential Liberty Subscribers, "Stand Alone" and "Common Systems"	257
Current Residential Liberty Subscribers "Non-Common Systems"	3 (commercial)

*SOURCE: "Demographic Profiles: A Portrait of New York City's Community Districts From 1980 & 1990 Censuses of Population and Housing," City of New York, Department of City Planning.

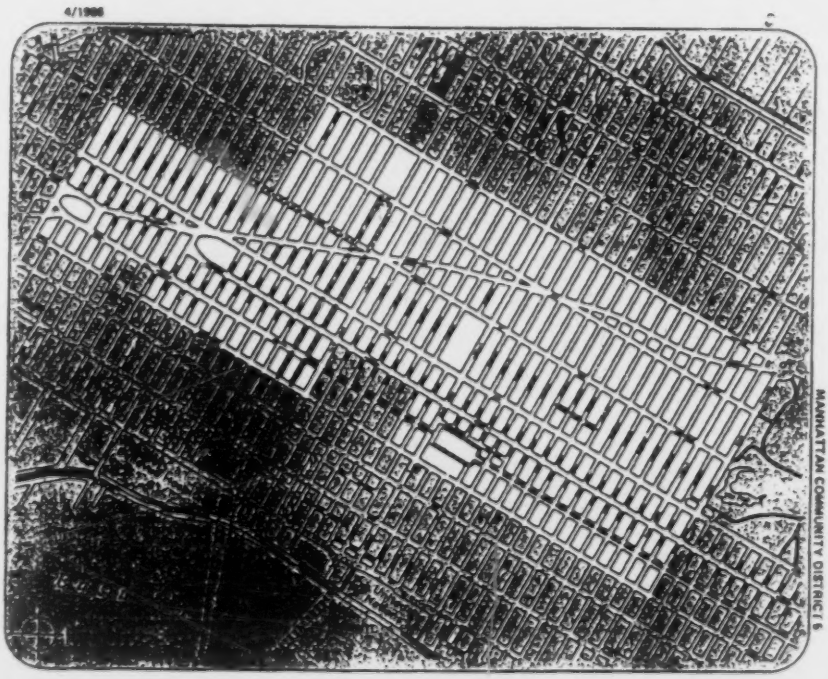


EXHIBIT D

HOUSING CHARACTERISTICS FOR COMMUNITY DISTRICT 6
(Based on 1990 Census)

Total Population	*133,748
Total Households	*83,151
Total Housing Units	*92,440
Current Residential Liberty Subscribers, "Stand Alone" and "Common Systems"	4,733
Current Residential Liberty Subscribers "Non-Common Systems"	1,184

*SOURCE: "Demographic Profiles: A Portrait of New York City's Community Districts From 1980 & 1990 Censuses of Population and Housing," City of New York, Department of City Planning.

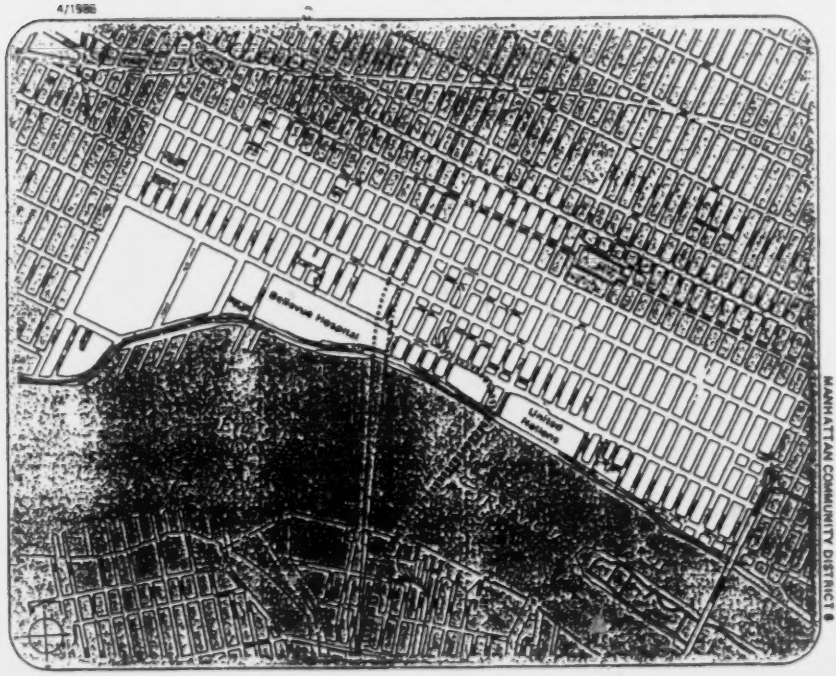


EXHIBIT E

HOUSING CHARACTERISTICS FOR COMMUNITY DISTRICT 7

(Based on 1990 Census)

Total Population	*210,993
Total Households	*115,117
Total Housing Units	*124,870
Current Residential Liberty Subscribers, "Stand Alone" and "Common Systems"	2,961
Current Residential Liberty Subscribers "Non-Common Systems"	458

*SOURCE: "Demographic Profiles: A Portrait of New York City's Community Districts From 1980 & 1990 Censuses of Population and Housing," City of New York, Department of City Planning.

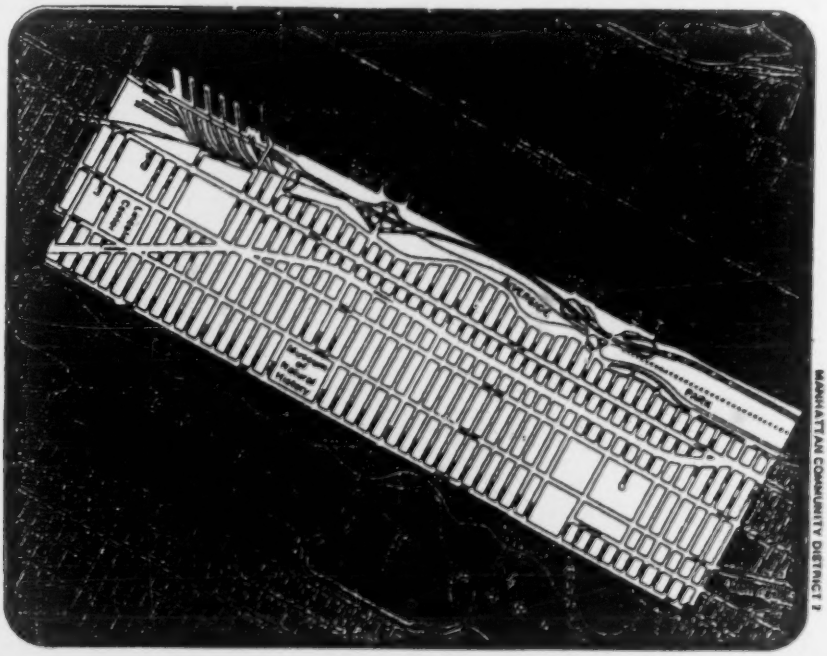
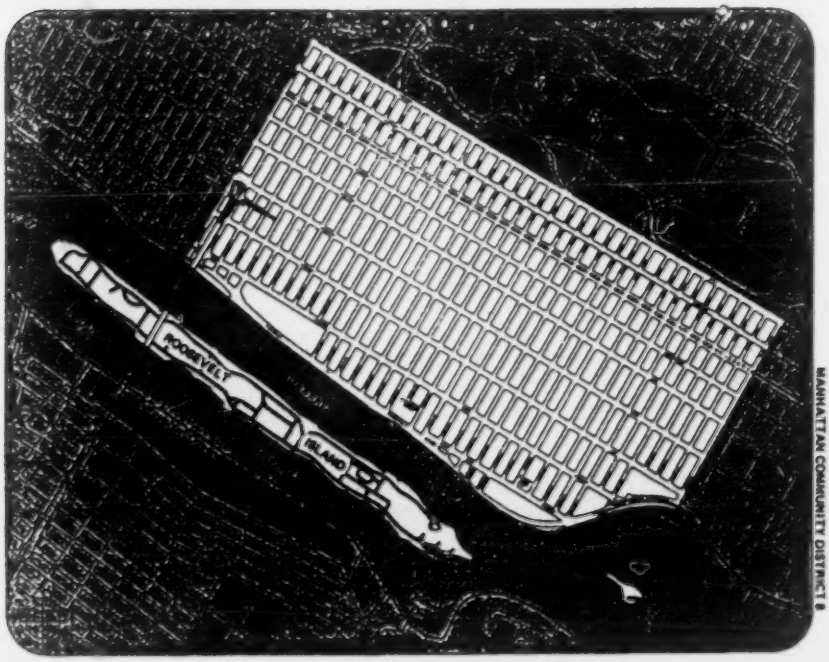


EXHIBIT F

HOUSING CHARACTERISTICS FOR COMMUNITY DISTRICT 8
(Based on 1990 Census)

Total Population	*210,880
Total Households	*121,715
Total Housing Units	*135,490
Current Residential Liberty Subscribers, "Stand Alone" and "Common Systems"	7,496
Current Residential Liberty Subscribers "Non-Common Systems"	709

*SOURCE: "Demographic Profiles: A Portrait of New York City's Community Districts From 1980 & 1990 Censuses of Population and Housing," City of New York, Department of City Planning.



TITLE VI — CABLE COMMUNICATIONS[1]

PART I — GENERAL PROVISIONS

SEC. 602. [47 U.S.C. 522] DEFINITIONS.

For purposes of this title —

(5) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(6) the term "cable service" means —

---

[1] Title VI of the Communications Act of 1934 was added by the Cable Communications Policy Act of 1984, Public Law 98–549, 98 Stat. 2780, Oct. 30, 1984. That Act also contained the following provisions:

JURISDICTION

SEC. 13. (a) * * *

(b) The provisions of this Act and amendments made by this Act shall not be construed to affect any jurisdiction the Federal Communications Commission may have under the Communications Act of 1934 with respect to any communication by wire or radio (other than cable service, as defined in section 602(5) of such Act) which is provided through a cable system, or persons or facilities engaged in such communications.

* * * * * * *

EFFECTIVE DATE

SEC. 19. * * *

(b) Nothing in section 623 or 624 of the Communications Act of 1934, as added by this Act, shall be construed to allow a franchising authority, or a State or any political subdivision of a State, to require a cable operator to restore, retier, or reprice any cable service which was lawfully eliminated, retiered, or repriced as of September 26, 1984.

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

(7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

PART III — FRANCHISING AND REGULATION

SEC. 621. [47 U.S.C. 541] GENERAL FRANCHISE REQUIREMENTS.

(a)(1) A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure —

(A) that the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority —

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b)(1) Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(c) Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d)(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject in whole or in part, to title II of this Act. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this title shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 3(v).

(e) Nothing in this title shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(f) No provision of this Act shall be construed to —

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

§ 812.[1] Definitions

The words and phrases used in this article shall have the following meanings unless a different meaning clearly appears in the context.

(1) "Cable television company" shall mean any person owning, controlling, operating, managing or leasing one or more cable television systems within the state.

(2) "Cable television system" shall mean any system which operates for hire the service of receiving and amplifying programs broadcast by one or more television or radio stations or any other programs originated by a cable television company or by any other party, and distributing such programs by wire, cable, microwave or other means, whether such means are owned or leased, to persons in one or more municipalities who subscribe to such service. Such definition does not include:

(a) any system which serves fewer than fifty subscribers; or

(b) any master antenna television system; or

(c) any cable television company which serves at least fifty but fewer than one thousand subscribers.

---

[1] Another section 812 is set out in Article 27, ante.

(3) "Commission" shall mean the commission on cable television created by this article.

(4) "Franchise" shall mean and include any authorization granted by a municipality in terms of a franchise, privilege, permit, license or other municipal authorization to construct, operate, maintain, or manage a cable television system in any municipality.

(5) "Gross annual receipts" shall mean any and all compensation received directly or indirectly by a cable television company from its operations within the state, including but not limited to sums received from subscribers or users in payment for programs received and/or transmitted, advertising and carrier service revenue and any other moneys that constitute income in accordance with the system of accounts approved by the commission.

Gross annual receipts shall not include any taxes on services furnished by a cable television company imposed directly on any subscriber or user by any municipality, state, or other governmental unit and collected by the company for such governmental unit.

(6) "Master antenna television system" shall mean any system which serves only the residents of one or more apartment dwellings under common ownership, control or management and any commercial establishment located on the premises of such apartment house and which transmits only signals broadcast over the air by stations which may be normally viewed or heard locally without objectionable interference, and which does not provide any additional service over its facilities.

(7) "Municipality" shall mean any village, town, city or county not wholly contained within a city in the state.

(8) "State" shall mean the state of New York.

(9) "State agency" shall mean any office, department, board, commission, bureau, division, public corporation, agency or instrumentality of the state.

(10) "Person" shall mean any individual, trustee, partnership, association, corporation or other legal entity.

(11) "Program" shall mean any broadcast-type program, signal, message, graphics, data, or communication content service.

Added L.1972, c. 466, § 1; amended L.1976, c. 654, § 1; L.1980, c. 652, § 1.

§ 814.[1] Commission created

1. A state commission on cable television is hereby created within the executive department which shall consist of five members none of whom shall hold any other public office and no more than three of whom shall be of the same political party. The members of the commission shall be representative of the broad range of interests related to telecommunication needs and concerns including so far as possible the fields of broadcasting, education television, cable television, communication technology and consumer interests.

2. Each member shall be appointed by the governor, by and with the advice and consent of the senate, for five years, provided, however, that of the five members first appointed, one shall be appointed for one year, one for two years, one for three years, one for four years and one for five years, from January first next succeeding their appointment. Their successors shall be appointed for terms of five years each. Members shall continue in office until their successors have been appointed and qualified.

3. The governor shall designate one of the members to be chairman who shall be the chief executive officer of the commission. The members shall elect one of their number as vice chairman of the commission.

---

[1] Another section 814 is set out in Article 27, ante.

4. Vacancies in the commission occurring otherwise than by expiration of term shall be filled for the unexpired term in the same manner as original appointments.

5. The chairman shall receive compensation fixed by the governor within the amount made available by appropriation therefor. The other members of the commission shall each receive an annual salary of five thousand dollars. Each member of the commission shall be entitled to the expenses actually and necessarily incurred by him in the performance of his official duties. The commission, its members, officers and employees shall be subject to the provisions of sections seventy-three and seventy-four of the public officers law.

6. A majority of the members of the commission then in office shall constitute a quorum for the transaction of any business or the exercise of any power or function of the commission. The commission may delegate to one or more of its members, or its officers, agents or employees, such powers and duties as it may deem appropriate.

7. The commission may appoint a counsel, an executive director and such other officers, employees, agents and consultants as it may deem necessary, prescribe their duties and fix their compensation within the amounts available therefor by appropriation.

Added L.1972, c. 466, § 1; amended L.1975, c. 35, § 1.

§ 815.[1] Duties of the commission

The commission shall:

(1) develop and maintain a statewide plan for development of cable television services, setting forth the objectives which the commission deems to be of regional and state concern;

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[1] Another section 815 is set out in Article 27, ante. Another section 815, formerly set out in Article 27-A, ante, was repealed.

(2) to the extent permitted by, and not contrary to applicable federal law, rules and regulations:

(a) prescribe standards for procedures and practices which municipalities shall follow in granting franchises, which standards shall provide for (i) the issuance of a public invitation to compete for the franchise; (ii) the filing of all franchise applications and related documents as public records, with reasonable notice to the public that such records are open to inspection and examination during reasonable business hours; (iii) the holding of a public hearing, upon reasonable notice to the public and the commission, at which the applicants and their proposals shall be examined and members of the public and interested parties are afforded a reasonable opportunity to express their views thereon; (iv) the rendition of a written report by the municipality, made available to the public, setting forth the reasons for its decision in awarding the franchise; and (v) such other procedural standards as the commission may deem necessary or appropriate to assure maximum public participation and competition and to protect the public interest;

(b) prescribe minimum standards for inclusion in franchises, including maximum initial and renewal terms; minimum channel capacity; provisions regarding access to, and facilities to make use of, channels for education and public service programs; a requirement that no such franchise may be exclusive; standards necessary or appropriate to protect the interests of viewers of free broadcast television and the public generally, which prohibit or limit cable television companies from prohibiting or entering into agreements prohibiting the sale or other transfer of rights for the simultaneous or subsequent transmission over free broadcast television of any program originated or transmitted over cable television; and such other standards for inclusion in franchises as the commission shall deem necessary or appropriate to protect the public interest;

(c) prescribe standards by which the franchising authority shall determine whether an applicant possesses (i) the technical

ability, (ii) the financial ability, (iii) the good character and (iv) other qualifications necessary to operate a cable television system in the public interest;

(d) prescribe standards for the construction and operation of cable television systems, which standards shall be designed to promote (i) safe, adequate and reliable service to subscribers, (ii) the construction and operation of systems consistent with the most advanced state of the art, (iii) a construction schedule providing for maximum penetration as rapidly as possible within the limitations of economic feasibility, (iv) the construction of systems with the maximum practicable channel capacity, facilities for local program origination, facilities to provide service in areas conforming to various community interests, facilities with the technical capacity for interconnection with other systems within regions as established in the commission's statewide plan and facilities capable of transmitting signals from subscribers to the cable television company or to other points; and (v) the prompt handling of inquiries, complaints and requests for repairs;

(e) prescribe such standards for the prohibition or limitation of concentration of control over mass media and communication companies and facilities and methods of enforcing such standards, as the commission may determine to be necessary or appropriate to protect the public interest; provided, however, that nothing herein contained shall be construed to authorize the impairment of any existing rights of any mass media and communication company or any subsidiary thereof.

(3) provide advice and technical assistance to municipalities and community organizations in matters relating to cable television franchises and services;

(4) establish minimum specifications for equipment, service and safety of cable television systems for use by municipalities;

(5) review and act upon applications for certificates of confirmation in accordance with such standards and as hereinafter provided;

(6) represent the interests of the people of the state before the federal communication commission and make available information on communications developments at the federal level;

(7) stimulate and encourage cooperative arrangements among organizations, institutions and municipalities in the development of regional educational, instructional and public affairs programming services;

(8) cooperate with municipalities to facilitate undertaking of multiple community cable television systems;

(9) encourage the creation of public and community groups, to organize, seek chartering when appropriate, and request franchising for the establishment of public, non-profit and not-for-profit cable television operations;

(10) maintain liaison with the communications industry and parties both public and private, having an interest therein, other states and agencies of this state to promote the rapid and harmonious development of cable television services as set forth in the legislative findings and intent;

(11) undertake such studies as may be necessary to meet the responsibilities and objectives of this article.

(12) implement the provisions of this article in a manner which is cognizant of the differing financial and administrative capabilities of companies of different sizes;

(13) encourage and cooperate with other state agencies that collect information from small cable television companies to eliminate duplicative reporting requirements.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, §§ 1, 2; L.1979, c. 713, § 3.

Chapter 14

Franchises, Revocable Consents and Concessions

§ 363. Franchises. a. Franchises shall be awarded only in accordance with the provisions of an authorizing resolution adopted by the council pursuant to the provisions of this section.

b. An initial determination of the need for franchises of a particular type shall be made by the head of the agency designated by the mayor as having the primary expertise and responsibility in the policy area covered by that type of franchise. Upon making such a determination, such agency, with the advice of the corporation counsel and such other agencies as the mayor shall determine, shall prepare a proposed authorizing resolution for that type of franchise and shall submit such proposed authorizing resolution to the mayor. Such a proposed authorizing resolution shall set forth the nature of the franchise or franchises to be granted, the public service to be provided, the terms and conditions of the franchise or franchises, including any subsidies that will be given to a franchisee, the method by which proposals will be solicited for the franchise or franchises and the criteria to be used in evaluating the proposals submitted in response to such a solicitation.

c. The mayor may submit such a proposed authorizing resolution to the council promptly upon submission to the council, the text of any such authorizing resolution shall be published in the City Record. Within ninety days of receiving such a proposed resolution, the council or a committee of the council shall hold a public hearing on such resolution. The council may approve, approve with modifications or disapprove such resolution by majority vote. Any action of the council approving a modification to a proposed authorizing resolution or disapproving a proposed authorizing resolution shall be subject to the disapproval of the mayor in the same manner as a local law which is passed by the council, and any such disapproval shall be subject to reconsideration, repassing and adoption, notwithstanding the objections of the mayor, in

the same manner as a local law which is disapproved by the mayor. The council may on its own initiative amend an authorizing resolution. The procedure for council review and approval of such a proposed amendment shall be the same as for an authorizing resolution.

d. No authorizing resolution or other action of the council may provide for any involvement by the council or any member of the council in the selection of a franchisee pursuant to such resolution.

e. Pursuant to an authorizing resolution adopted by the council, the responsible agency may issue one or more requests for proposals or other solicitations of proposal, provided that (1) the corporation counsel shall have determined that the request for proposals is consistent with the provisions of the authorizing resolution and (2) no such request or solicitation shall be issued unless either the department of city planning has determined that the proposed franchise would not have land use impacts or implications or such request or solicitation has been reviewed and approved pursuant to section one hundred ninety-seven-c and section one hundred ninety-seven-d. A community board may waive a public hearing and the preparation of a written recommendation with respect to any such request for proposals or solicitation which in its judgment does not involve a substantial land use interest. Any such request for proposals or solicitation issued in accordance with this subdivision shall set forth the criteria and procedures to be utilized in evaluating the proposals submitted in response to such request or solicitation.

f. The selection of a franchisee shall be in accordance with the provisions of the authorizing resolution covering franchises of the type involved. Each such selection and each franchise agreement shall be subject to the review and approval of the franchise and concession review committee pursuant to sections three hundred seventy-one, three hundred seventy-two and three hundred seventy-three.

g. Nothing in this section shall preclude any agency, prior to proposing an authorizing resolution, from issuing one or

more requests for information or other solicitations of information regarding the availability of potential franchisees with expertise in the subject matter of a proposed type of franchise, suggestions regarding the appropriate terms and conditions which should be contained in an authorizing resolution for that type of franchise or any other information which would assist the agency in determining how to proceed with regard to the public service involved.

h. All franchises shall be consistent with the following requirements:

(1) Every grant of a franchise or modification thereof must be by written agreement approved by the franchise and concession review committee and executed by the responsible agency under the authority of an authorizing resolution adopted by the council in accordance with the provisions of this chapter.

(2) No such agreement shall be for a longer period than twenty-five years except that in the case of a tunnel railroad it may be for a period not exceeding fifty years.

(3) The agreement may, at the option of the city, provide for giving to the grantee the right of renewals not exceeding in the aggregate twenty-five years on a fair redetermination of the compensation to the city to be made upon standards and methods as therein specified.

(4) At the termination of such agreement all the rights or property of the grantee in the inalienable property of the city to which the franchise relates shall cease without compensation.

(5) Any such agreement may provide that upon its termination the property, plant and equipment of the grantee shall, to the extent therein specified, thereupon be and become the property of the city, either without compensation to the grantee or on payment to the grantee of the fair value thereof as property, to be determined as provided in the contract, but excluding any value derived from the franchise. The city shall have the option either to take and operate on its own account

the property, plant and equipment when so acquired, or to lease the same for a term not exceeding twenty years or to require that the property of the city be restored to its condition prior to the granting of the franchise.

(6) Every agreement granting a franchise for the performance of any public service shall contain an agreement by the grantee to recognize the right of its employees to bargain collectively through representatives of their own choosing, and at all times to recognize and deal with the representatives duly designated or selected by the majority of its employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment and not to dominate, interfere with or participate in the management or control of or give financial support to any union or association of its employees. This subdivision shall not apply to a contract providing for a modification or amendment of or extension of service under a franchise not containing a similar provision, provided that the term of such franchise is not extended thereby.

Supreme Court, U.S.
FILED
FEB 16 1996
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No. 95-953

IN THE

Supreme Court of the United States

October Term, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

against

CITY OF NEW YORK, RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY, and PARAGON CABLE MANHATTAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: February 16, 1996
Albany, New York

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9 pp

Table of Contents

Page

Table of Authorities ii

Brief in Opposition to Petitition for a Writ of Certiorari ... 2

ATTACHMENT:

Order Vacating Standstill Order 4

TABLE OF AUTHORITIES

Page

Section 301(a)(2) of the Telecommunications Act of 1996 2

Section 602(7) of the Communications Act (47 U.S.C. §522(7)) 2

1995 N.Y. Laws, Chapter 83 2

No. 95-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

LIBERTY CABLE COMPANY, INC.,

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-against-

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Liberty Cable Company, Inc. (Liberty), a provider of cable television service to apartment houses in New York City, seeks review of the denial of a preliminary injunction against an administrative "standstill" order that precluded Liberty from attaching new customers until it obtained a franchise. The Public Service Commission of the State of New York (Commission)[1] believes any grant of a writ of certiorari would be improvident because section 301(a)(2) of the Telecommunications Act of 1996 amends the definition of "cable system" in section 602(7) of the Communications Act (47 U.S.C. § 522(7)) to eliminate prospectively, as of February 8, 1996, any federal requirement that a franchise be obtained to serve an apartment house.

Further, the attached order frees Liberty from the restraints of the "standstill" order preventing extension of Liberty's service to new customers and provides that the proceeding against Liberty applies only to the period before February 8, 1996. Thus, the only issue between Liberty and the Commission is the lawfulness of Liberty's operations before February 8, 1996. This question, which at this point is undecided, does not justify issuance of a writ of certiorari. In addition, any request for injunctive relief against the Commission's pending administrative proceeding is not ripe for the reasons given by the Second Circuit and the District Court.

---

[1]Pursuant to 1995 N.Y. Laws, Chapter 83, the Commission assumed the responsibilities of the New York State Commission on Cable Television as of January 1, 1996.

Respectfully submitted,

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Dated: February 16, 1996
Albany, New York

ATTACHMENT

Order Vacating Standstill Order

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on February 15, 1996

COMMISSIONER PRESENT:
Lisa Rosenblum

Case 90460- Petition of Time Warner Cable of New York City and Paragon Cable - Manhattan Regarding the Operations of Liberty Cable Company, Inc.

ORDER VACATING STANDSTILL ORDER

(Issued and Effective February 15, 1996)

This proceeding was commenced by the Commission on Cable Television by Order to Show Cause issued August 23, 1994 pursuant to Article 28 of the Executive Law. Subsequently, on December 9, 1994, the Commission on Cable Television entered an order ("Standstill Order) enjoining the respondent, Liberty Cable Company, Inc. (Liberty), from providing cable television service through any new interconnections by wire of multiple unit dwellings that were not commonly owned, controlled or managed.

This Standstill Order, although the subject of an action brought by Liberty Cable in U.S. District Court, remained in full force and effect on January 1, 1996, when, Article 28 of the Executive Law was repealed and the substance thereof transferred to Article 11 of the Public Service Law. The Public

Service Commission now has the statutory responsibility for administering statutory provisions formerly contained in Article 28 and is the successor-in-interest to the Commission on Cable Television in this proceeding.

On February 8, 1996, the President signed into law the Telecommunications Act of 1996. Section 301(a)(2) of the new law amends the definition of "cable system" in Section 602(7) of the Communications Act (47 U.S.C. §522(7)) in a manner that would now permit without a franchise the same operations which under the prior definition required a franchise and were the subject of the Standstill Order. The Standstill Order was based upon the prior definition of cable system in the Communications Act. The change in that definition appears to be effective immediately upon enactment of the Telecommunications Act. Therefore, the Standstill Order of December 9, 1994, the issues addressed by which are prospectively mooted by the Telecommunications Act of 1996, will be vacated with respect to all connections made after February 8, 1996.

The question of what remedies, if any, should be imposed for Liberty's alleged violations before February 8, 1996 remain pending before us and will be addressed and resolved in due course.

It is Ordered:

1. The order of the Commission on Cable Television, entered December 9, 1994, enjoining Liberty Cable from providing cable television service through any new interconnections by wire of multiple unit dwellings that were not commonly owned, controlled or managed is vacated with respect to all connections made after February 8, 1996.

2. This proceeding is continued.

s/Lisa Rosenblum
LISA ROSENBLUM
Commissioner

Supreme Court, U.S.
FILED
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No. 95-953

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

- against -

CITY OF NEW YORK, RALPH A. BALZANO,

(caption continued on following page)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Commissioner of Department of Information Technology and Telecommunications, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY and PARAGON CABLE MANHATTAN,

Respondents.

COUNTER-QUESTION PRESENTED

Whether this Court should grant the writ where: (a) the entire case will be moot if, because of a bill signed by the President on February 8, 1996, the administrative proceeding pending against petitioner is withdrawn or if that proceeding is resolved in petitioner's favor and (b) even if the proceeding is not immediately withdrawn, the new legislation has completely altered the ripeness analysis in this case so that this Court, in ruling on ripeness on the present record, would be rendering an opinion on a state of facts that no longer exists and no longer matters to anyone.

TABLE OF CONTENTS

	Page
COUNTER-QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	2
OPINIONS BELOW	14
REASONS FOR DENYING THE WRIT	17
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) . 14, 15, 18, 19, 21

Alexander v. United States, ___ U.S. ___, 113 S. Ct. 2766 (1993) 19

Amsat Cable v. Cablevision of Connecticut, 6 F.3d 867 (2d Cir, 1993) 21

Beach Communications, Inc. v. Federal Communications Commission, 959 F.2d 975 (DC Cir, 1992) . . . 7, 14

Beach Communications, Inc. v. Federal Communications Commission, 965 F.2d 1103 (DC Cir, 1992), rev'd, ___ U.S. ___, 113 S. Ct. 2096, on remand, 10 F.3d 811 (DC Cir, 1993) 7

Beach Communications, Inc. v. Federal Communications Commission, 10 F.3d 811 (DC Cir, 1993) 9

Cecos International, Inc. v. Jorling, 895 F.2d 66 (2d Cir, 1990) 22

Federal Communications Commission v. Beach Communications, Inc., ___ U.S. ___, 113 S. Ct. 2096, on remand, 10 F.3d 811 (DC Cir, 1993) 8, 15

Gannett Satellite Information Network v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir, 1984) 20, 21

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) 22

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 20

Ticor Title Insurance Co. v. Brown, ___ U.S. ___, 114 S. Ct. 1359 (1994) 19

Vance v. Universal Amusement Co., 445 U.S. 308 (1980) 20

Ward v. Rock Against Racism, 491 U.S. 781, rehearing denied, 492 U.S. 937 (1989) 20

Younger v. Harris, 401 U.S. 37 (1971) 22

STATUTES

47 U.S.C. section 522(5) 4

47 U.S.C. section 522(6) 4

47 U.S.C. section 522(7) 4, 10, 18

47 U.S.C. section 522(7)(B) 4

47 U.S.C. section 522(9) 4

47 U.S.C. section 522(10) 4

47 U.S.C. section 531 5

47 U.S.C. section 532 4

47 U.S.C. section 534 4

47 U.S.C. section 535 4

47 U.S.C. section 541(a)(3) 4

47 U.S.C. section 541(b)(1) 4

47 U.S.C. section 542 5

47 U.S.C. section 544 5

47 U.S.C. section 544(d) 5

47 U.S.C. section 544(g) 5

47 U.S.C. section 551 5

47 U.S.C. section 552 5

47 U.S.C. section 556(a) 3

NY Executive Law sections 811 through 831 5

NY Executive Law section 812(2) 5

NY Executive Law section 816[1] 6

NY Executive Law section 819 4

NY Executive Law section 819[1] 5

NY Executive Law section 821[1] 5

NY Executive Law section 821[2] 6

NY Executive Law section 827-a 6

NYC Charter section 362[b] 6

NYC Charter section 363[a] 6

NYC Charter section 363[f] 6

NYC Charter sections 2700 through 2702 7

REGULATIONS

9 NYCRR Parts 589 through 599 5

OTHER

Telecommunications Act of 1996 section 301(a)(2) 18

Pub. L. No. 102-385, 106 Stat. 1460 3

Pub. L. No. 98-549, 98 Stat. 2780 3

NYC Council Resolution 1639 6

M. Nimmer, Nimmer on Freedom of Speech section 4.08 at 4-14 (1984) 19

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *Liberty's Methods Of Signal Delivery*

Petitioner Liberty Cable Company, Inc. ("Liberty") receives video signals from a satellite or satellites, processes the signals and then delivers them to its customers (JA1180).[1] Its customers are building owners, such as cooperative housing corporations and, less frequently, landlords and condominium associations (JA298, 312, 317). Cooperative housing corporations and condominium associations typically bill their residents to cover Liberty's charges for basic channels (JA317, 339). The residents of the buildings to which Liberty provides video signals are termed Liberty's "subscribers" and have the option of purchasing additional channels directly from Liberty (JA298, 312, 317). Residents of buildings that are customers of Liberty may purchase cable services from the franchised cable operator in the area instead of, or in addition to, receiving video signals from Liberty (JA317).

The signal Liberty receives from a satellite or satellites is transmitted through the air by microwave to a receiving dish and then travels by cable to Liberty's subscribers (JA1180-81). Liberty's type of microwave transmission, which takes place over the 18 Ghz band, requires a line of sight between the transmitter and receiver (JA1424). The signal travels by cable through three different configurations (JA1180-81). In none of the three configurations does any of Liberty's equipment or cable come in contact with property of the City of New York ("City") (JA1180-81).

---

[1] Numbers in parentheses preceded by "JA" refer to pages in the Joint Appendix filed in the Court of Appeals.

In the first configuration, the receiver is on the top of the subscribers' building and the cable runs from the receiver to the subscribers without touching any other building (JA1180). This configuration is termed a "SMATV" system, for "Satellite Master Antenna Television" system, although the word "Satellite" is a misnomer because the signal comes by microwave from Liberty's transmitter rather than directly from a satellite (JA1178-79).

In the second configuration, the cable also runs to subscribers in one or more other buildings that are commonly owned, controlled or managed with the building on which the receiver sits (JA1181). This is referred to as a "common system" (JA1181).

The third configuration is the only configuration at issue in this lawsuit. In this configuration, the cable runs to subscribers in one or more other buildings that are not commonly owned, controlled or managed with the building on which the receiver sits (JA1181). This is referred to as a "non-common system" (JA1181). Buildings that are not commonly owned, controlled or managed will be referred to herein as "non-common buildings."

B. Relevant Statutes And Regulations

The relevant federal statute is the Cable Communications Policy Act of 1984 ("Cable Act"). Pub L No 98-549, 98 Stat 2780 (codified at 47 USC sections 521-59). The Cable Act was amended in 1992. Pub L No 102-385, 106 Stat 1460. The Cable Act explicitly preempts inconsistent provisions of state law. 47 USC section 556(a).

The Cable Act defines a "cable operator" as any person who provides "cable service" over a "cable system." 47 USC section 522(5). It is undisputed that Liberty provides "cable service" and that Liberty provides its cable services over a "cable system." *See id.* sections 522(6) and 522(7). It is further undisputed that, but for its non-common systems, Liberty would come within the following exemption from the definition of "cable system":

> a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way ....

Id. section 522(7)(B). This exemption sometimes is referred to as the "private cable exemption" and the requirement that, to fall within the exemption, the cable must not connect buildings that are not commonly owned, controlled or managed sometimes is referred to as the "common ownership requirement."

Under the Cable Act, a cable operator may not provide cable service without a franchise from a franchising authority. 47 USC sections 522(9) & (10), 541(b)(1). In the State of New York the municipality is the franchising authority. NY Executive Law section 819.

The Cable Act contains requirements that all cable operators must meet. These include the requirements that cable operators: provide channel capacity for commercial leased access by program suppliers unaffiliated with the cable operator, 47 USC section 532; not avoid low-income areas, *id.* section 541(a)(3); must carry the local broadcast channels, *id.* sections 534, 535; provide subscribers with the ability to block

out obscene or indecent programming upon subscriber request, *id.* section 544(d); comply with FCC regulations concerning the emergency broadcast system, *id.* section 544(g); and meet strict requirements on the collection and disclosure of personally identifiable information concerning subscribers, *id.* section 551. The Cable Act also specifies certain requirements that the franchising authority may, in its discretion, impose on cable operators. These include the requirements that cable operators: provide channel capacity for public, educational or government use, *id.* section 531; pay fees to the franchising authority, *id.* section 542; meet the franchising authority's requirements for technical standards and provision of services, facilities and equipment, *id.* section 544; and meet the franchising authority's consumer protection and customer service requirements, *id.* section 552.

In the State of New York cable television is regulated by Article 28 of the Executive Law and, at all times relevant hereto, by the New York State Commission on Cable Television ("NYSCCT") (*see* Petition at 3 n.3). NY Executive Law sections 811 through 831; 9 NYCRR Parts 589 through 599. It is undisputed that Liberty meets the definition of "cable television system" in the Executive Law. NY Executive Law section 812(2) (App. 177). As here relevant, the Executive Law provides that no cable television system may operate, whether or not it uses a public thoroughfare, without a franchise from each municipality in which it provides service. *Id.* section 819[1]. The Executive Law also provides that no franchise shall be effective until it has been confirmed by the NYSCCT. *Id.* section 821[1]. The Executive Law further provides that a municipality shall have the power to require a franchise of every cable television system providing service within the municipality, whether or not the system uses a public street, and that the "provision of any municipal charter

or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises." *Id.* section 821[2]. Finally, the Executive Law provides that NYSCCT may issue such orders as it may find necessary and may fine any cable television company that violates any provision of Article 28 up to $1,000 per day. *Id.* sections 816[1], 827-a.

The New York City Charter defines a "franchise" as a grant by a City agency of a "right to occupy or use the inalienable property of the city to provide a public service." NYC Charter section 362[b]. The Charter provides that franchises may be awarded only pursuant to an authorizing resolution of the City Council, *id.* section 363[a] (App. 184), and that franchises awarded by City agencies must be approved by the Franchise and Concession Review Committee and the Mayor, *id.* sections 363[f] (App. 185), 372, 373.

On October 13, 1993, the City Council adopted Resolution 1639, which empowers the Department of Telecommunications and Energy, which is now the Department of Information Technology and Telecommunications ("DOITT"), to issue franchises for cable television services "and the installation of cable television facilities and associated equipment on, over, and under the inalienable property of the City of New York" (App. 139-46). Resolution 1639 imposes several of the requirements that, under the Cable Act, franchising authorities may impose on cable operators, including franchise fees, quality work and construction methods, "state-of-the-art" cable service, universal service, the prompt and efficient resolution of consumer complaints, and channel capacity for public, educational and governmental use (App. 141-44). Resolution 1639 also provides that no franchise shall be awarded unless the area covered by the franchise includes at least one entire

community district and 30,000 households (App. 144-45). *See* NYC Charter sections 2700 through 2702.

C. *Events Prior To This Lawsuit*

On March 6, 1992, in *Beach Communications, Inc. v. Federal Communications Commission*, 959 F2d 975 (DC Cir, 1992) ("*Beach I*"), the United States Court of Appeals for the District of Columbia Circuit expressed grave concern that the equal protection clause is violated by the exclusion of non-common systems, such as those Liberty now operates, from the private cable exemption, *i.e.*, by the inclusion of non-common systems in the coverage of the Cable Act while SMATV and common systems are not included. The Court remanded the matter to the Federal Communications Commission ("FCC"). On April 7, 1992, Liberty sent a letter to the FCC urging the FCC to defend the exclusion of non-common systems from the private cable exemption (JA542-43, 608-20). Among other things, Liberty stated that the first amendment claims of the petitioners in *Beach* were not ripe (JA609), that it is the "better economic choice" for Liberty to connect non-common buildings by microwave, rather than cable, because that avoids state and local franchising requirements (JA615), and that if non-common systems are subject to the Cable Act Liberty will expand its systems to non-common buildings by microwave rather than cable (JA615).

On June 9, 1992, the District of Columbia Court of Appeals struck down the exclusion of non-common systems from the private cable exemption on equal protection grounds under the rational basis test. *Beach Communications, Inc. v. Federal Communications Commission*, 965 F2d 1103 (DC Cir, 1992) ("*Beach II*"). According to Liberty, it began constructing its non-common systems, in which non-common

buildings are connected by cable, in January of 1993 (JA1182). However, on June 1, 1993, this Court reversed *Beach II* and upheld the exclusion of non-common systems from the private cable exemption on equal protection grounds under the rational basis test. *Federal Communications Commission v. Beach Communications, Inc.*, ___ US ___, 113 S Ct 2096 (1993) ("*Beach III*"). This Court remanded the case to the Court of Appeals for a determination of whether heightened scrutiny should apply, because first amendment rights are involved, and the Court of Appeals ruled on October 22, 1993 that heightened scrutiny did not in fact apply. *Beach Communications, Inc. v. Federal Communications Commission*, 10 F3d 811 (DC Cir, 1993) ("*Beach IV*").

After *Beach IV* thus upheld the Cable Act's coverage of inclusion of non-common systems, Liberty, contrary to its representations to the FCC in its April 7, 1992 letter, continued to install new non-common systems with cable and did not, in its existing non-common systems, remove its wires between non-common buildings and replace the connections with microwave transmission (JA1182). Liberty also did not apply to DOITT for a franchise at that time.

Respondent Time Warner Cable of New York City and its affiliate Respondent Paragon Cable Manhattan will be referred to as "Time Warner." The two cable franchises they hold cover all of Manhattan (JA267). In May of 1994 Time Warner discovered the existence of some of Liberty's non-common systems (JA398-403) and filed a complaint with the NYSCCT arguing that operation of its non-common systems renders Liberty a "cable operator" under the Cable Act and that Liberty was not complying with the requirements of the Cable Act and Executive Law (JA393-409). On August 23, 1994, NYSCCT, acting on Time Warner's complaint, issued an order

to show cause commencing a proceeding against Liberty and directing Liberty to show cause why it should not be determined to be a cable television system under Article 28 or, alternatively, why it should not be compelled to remove all cables between non-common buildings until it obtains a franchise from the City and its franchise is confirmed by NYSCCT (App. 135-38). The order to show cause recites that NYSCCT staff inspected two premises at which they found evidence that Liberty was operating non-common systems and that Liberty thus appears to be a cable system under the Cable Act and not within the private cable exemption (App. 136-37). The order to show cause gave Liberty until September 18, 1994 to enter a notice of appearance (App. 137).

On September 9, 1994, Liberty met with DOITT in order to request that DOITT ask NYSCCT to extend Liberty's time to respond to the order to show cause (JA831). At that meeting, *inter alia*, Liberty stated that if NYSCCT were to rule against Liberty, Liberty would replace its cable connections between non-common buildings with microwave connections (JA831). On October 18, 1994, Liberty requested of NYSCCT an extension of its time to respond to the order to show cause to April 17, 1995 (JA485). Liberty requested this extension in order to conclude "negotiations" between it and DOITT that would result in Liberty obtaining a franchise or some "other mutually acceptable resolution of this matter" (JA485). Liberty also stated, "In the interim, Liberty agrees that it will not construct any new 'cable television systems' as that term is defined in 47 USC § 522(7)," meaning non-common-systems (JA485). By letter dated October 19, 1994, NYSCCT denied Liberty's request and directed Liberty to respond to the order to show cause by November 1, 1994 (JA487-88).

By letter dated October 28, 1994, Liberty, for the first time, expressed an interest in a franchise from DOITT (JA493). Its letter reads in its entirety, "Please be advised that [Liberty] is interested in applying for a cable television franchise pursuant to the Resolution No. 1639 and applicable federal law" (JA493).

Liberty responded to NYSCCT's order to show cause on October 31, 1994 (JA503-09). In its response Liberty again requested that the hearing be held in abeyance for 180 days in order for Liberty to conduct negotiations for a franchise and promised, if that request were to be granted, not to construct any "'cable systems' as that term is defined in 47 USC § 522(7)" during that period (JA503-04). On November 18, 1994, NYSCCT scheduled a hearing for December 9, 1994 (App. 148).

D. Events Since Commencement Of This Lawsuit

The summons and complaint herein were issued December 8, 1994; the Appendix to the Petition includes the Second Amended Complaint which is identical as relevant hereto (App. 97-121, JA5). In the complaint Liberty admitted that because of its non-common systems, it is required to have a franchise from DOITT but never applied for one (App. 105, 106). Liberty contended that application of the franchise requirement to it violates its rights under the first amendment because Liberty does not use public rights-of-way (App. 112-13).

At the hearing before the NYSCCT on December 9, 1994, procedural matters were discussed and argument was heard but no evidence was taken (JA550-76). One of the members of NYSCCT and an attorney for Time Warner stated that among the issues before the NYSCCT is whether the Cable Act's

coverage of non-common systems is constitutional (JA565, 566).

At the conclusion of the hearing NYSCCT issued the "standstill order" that is the subject of Liberty's present motion for a preliminary injunction (App. 150). The order directs that Liberty (App. 150):

> establish no additional cable or other closed transmission interconnections of buildings not commonly owned, controlled or managed [and] that Liberty shall not energize any new subscribers through such hard-wired interconnected buildings to which service is not currently being provided unless under common management, control or ownership ....

Liberty was not enjoined from continuing to use, and derive revenue from, its existing, admittedly-illegal non-common systems.

Liberty moved in the District Court for a temporary restraining order and preliminary injunction prohibiting enforcement of the standstill order (JA131-33). In its initial moving papers, Liberty stated that the cost of a "head end" facility, which receives signals from satellites and transmits signals to the receivers on top of buildings owned by Liberty's customers, is $750,000 and that the cost of a receiver is $25,000 (JA137).

Time Warner submitted an affidavit of its Senior Vice President for Engineering and Technical Operations ("Chief Engineer") (JA744-50), in which he stated as follows. After NYSCCT issued its order to show cause, Liberty filed applications with the FCC for receiver sites at the very

buildings identified by Time Warner as being served illegally by Liberty in non-common configurations (JA745, 752-823). In addition, since 1991 Liberty has filed applications for receiver sites at all but three of the buildings Liberty admits to serving in non-common configurations (JA746). As to the other three sites, there is no technical reason why Liberty cannot serve these buildings by microwave transmission (JA747). Although Liberty contends that there are 33 buildings that it wishes to add as customers in non-common configurations, it has identified only two such buildings and both can be served by existing transmitters (JA748-49).

Time Warner's Chief Engineer also stated as follows. Although Liberty states that its "head end" facility is on East 95th Street, in fact Liberty has at least seven transmitter sites, with applications pending for more (JA747). At many of these sites Liberty maintains multiple transmission paths (JA747). The signal from a single transmitter can be split multiple times and it is apparent from Liberty's FCC applications that Liberty already splits its signal at numerous transmitter locations (JA748). Liberty also uses, and is capable of increasing its use of, repeaters, which are less expensive than transmitters (JA748). Liberty always is free to negotiate with property owners to obtain transmitter and repeater sites in order to give it "line-of-sight" access to its receivers (JA747-48).

Finally, Time Warner's Chief Engineer stated as follows. Based on information obtained from suppliers of equipment used by systems like Liberty's, it appears that the capital investment per building for a SMATV configuration is about $16,000 (JA749). Because Liberty typically enters into contracts of five or ten years' duration in which the building owner promises to pay every month for basic service to every unit, and because Liberty then also receives revenue from

subscribers for premium and pay-per-view services, Liberty should be able to install SMATV configurations profitably at even relatively small apartment buildings (JA749-50).

In response to the affidavit of Time Warner's Chief Engineer, Liberty submitted an affidavit of its Director of Engineering (JA1424-26). Although Liberty's Director of Engineering asserted that Time Warner's Chief Engineer's description of Liberty's microwave system was "inaccurate, incomplete and demonstrates [*sic*] an ignorance of how 18 ghz microwave technology is designed and deployed," Liberty's Director of Engineering offered only the "example" that Time Warner's Chief Engineer was "completely wrong about the cost and profitability of 18 ghz transmission equipment, the ability to 'split' the signal and that 'Liberty can technically serve practically any apartment building' with 18 ghz microwave technology" (JA1424). But Liberty's Director of Engineering then offered absolutely no figures on cost or profitability; furthermore, the majority of the remainder of his affidavit merely repeated over and over the proposition, obviously recognized by Time Warner's Chief Engineer, that Liberty must negotiate with property owners and that there is no guarantee that it will be able to obtain a transmitter site for every building it wishes to serve (JA1424-26). Although Liberty's Director of Engineering did state that the selection of transmitter sites must take into account "preexisting microwave interference [and] signal degradation over distance," he offered no further explanation of these considerations and did not contend that these considerations made it impossible profitably to serve any of Liberty's existing non-common configurations or the 33 buildings allegedly interested in Liberty's service (JA1424).

On February 24, 1995, DOITT published its notice of rulemaking for solicitation for franchises for cable television service that does not use City property (App. 91-96). The notice states in part that DOITT had been unaware of any interest in franchises of this nature until Liberty's October 28, 1994 expression of interest in a franchise (App. 91). The notice provided that the public comment period on the proposed rules would close on April 3, 1995 and that there would be a public hearing on the proposed rules on April 4, 1995 (App. 91-92). (Comments were in fact received and the public hearing was in fact held as planned.)

OPINIONS BELOW

A. *The District Court Opinion*

Addressing ripeness, the District Court applied the two-part test of *Abbott Laboratories v. Gardner*, 387 US 136, 149 (1967). As to Liberty's first amendment claims, and as to the first part of the test, fitness for judicial decision, the District Court agreed with the analysis of *Beach I*, in which the Court of Appeals held not ripe claims of operators of non-common configurations that inclusion of non-common configurations in the definition of "cable system" violated the first amendment (App. 44-47). The District Court also agreed with the Court of Appeals in *Beach I* that because Liberty has not yet been offered a franchise by DOITT, Liberty cannot identify what burdens the franchise will place on Liberty, the Court cannot know the governmental interests that might justify the burdens, and, because the level of scrutiny to be applied depends on the burdens on Liberty's speech, the Court cannot even determine the level of scrutiny to be applied (App. 44-47).

As to the second part of the *Abbott Laboratories* test, the hardship to the parties of withholding decision, the District Court first found that the cost of Liberty's compliance with the franchising scheme in the interim, *i.e.*, until its claim is fit for judicial decision, is unknown, because the franchising process is ongoing, but that the "delay" may well be brief (App. 48). Second, the Court found, the threat that Liberty will have to remove the wires connecting non-commonly owned buildings is not imminent (App. 48 & n.18). The Court further found that any alleged hardship to Liberty from interruption of service to its subscribers in non-common configurations, or its inability to add subscribers in non-common configurations, is of Liberty's own making because of its failure to request a franchise from DOITT upon the issuance of *Beach III* in June of 1993 (App. 49-53). And finally, the District Court found that Liberty's claim that it will suffer hardship during the pendency of the franchising process is undercut by its requests for first a 30-day, and then a 180-day, adjournment of the NYSCCT hearing during which Liberty promised not to construct any new non-common systems (App. 53).

On the other hand, the District Court found that a substantial hardship would be imposed on NYSCCT and DOITT because those agencies' ongoing proceedings would be interfered with (App. 53-54). The Court noted that this Court held in *Abbott Laboratories* that the ripeness doctrine not only protects courts from premature adjudications, but also "'protect[s] the Agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties'" (App. 53) (quoting 387 US at 148-49). On balance, considering the two parts of the *Abbott Laboratories* test, the District Court determined that Liberty's first amendment claims were not ripe (App. 54).

The District Court also found Liberty's due process claims not ripe (App. 59-62). The Court noted that the gravamen of Liberty's due process claim had been that DOITT had no procedure by which Liberty could apply for a franchise for a cable television system that did not use City property and that upon issuance of the notice of rulemaking, Liberty's due process claim changed into the arguments that the City has boundless discretion in determining whether to award a franchise and that the process will take too long (App. 59-61). Accordingly, the District Court found Liberty's present due process arguments not ripe because: there has been no final agency action; a judicial attempt to rule on Liberty's claims at this time would require a ruling "in a vacuum on issues that might never arise"; and "a more fully developed factual record is required for reasoned adjudication of [Liberty's] claims" (App. 61). The Court also noted that the Cable Act requires DOITT to act reasonably and thus if the City acts unreasonably, either by unreasonably prolonging the proceedings or by imposing unreasonable burdens, Liberty may seek its remedy under the Cable Act on a fully-developed record (App. 61-62).

B. The Court of Appeals Opinion

The Court of Appeals for the Second Circuit affirmed on the District Court's opinion (App. 5, 6). The Court of Appeals wrote further, however, to address Liberty's due process argument (App. 5-7). The Court stated (App. 6):

> Liberty is apparently the first cable operator ever to have approached the City about acquiring a franchise for a non-common system. Such systems are not in widespread use, and we were informed at oral argument that no city currently has franchising

> regulations in place for such systems. In a technical field like cable television, a governmental entity, authorized to license a variety of cable systems, is not required to anticipate all of the different types of service that cable operators might wish to render and keep licensing regulations on the shelf for every variety of applicant that might request a franchise.

The Court stated further that there was no evidence of unreasonable administrative delay and that as long as the City does not unduly delay the completion of the rulemaking proceeding and acts with reasonable diligence on Liberty's franchise application, Liberty's due process rights will not be violated (App. 6).

Although not in the record, it is undisputed that on November 13, 1995 the City concluded the rulemaking process by issuing a request for proposals for cable systems that would not use City property, that Liberty and one other entity submitted proposals and that the City has until March 1, 1996 to respond to those proposals (*see* Petition at 5 n.6).

REASONS FOR DENYING THE WRIT

A. *The Telecommunications Act of 1996 Has Entirely Changed the Ripeness Analysis In This Case, Rendering Review By This Court Pointless*

All of Liberty's claims are based on its rather extreme position that because it does not use any City property the first amendment prohibits any level of government from regulating it at all. However, on February 1, 1996, Congress passed the Telecommunications Act of 1996 ("Act") and it was signed

into law by the President on February 8, 1996. Section 301(a)(2) of the Act provides:

> CHANGE IN DEFINITION OF CABLE SYSTEM. Section 602(7) (47 U.S.C. 522(7)) is amended by striking "(B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way;" and inserting "(B) a facility that serves subscribers without using any public right of way;"

Section 522(7) contains exemptions from the definition of "cable system" and the new language inserted by section 301(a)(2) of the Act thus takes Liberty's non-common systems out of the coverage of the Cable Act entirely. Assuming that Liberty's non-common systems do not use public rights of way, and will continue not to do so, Liberty no longer needs a franchise from the City.

Thus, for the period beginning February 8, 1996, this case is moot. As to the period before that date, the Act entirely changes the ripeness analysis in at least the following respects. As to the first prong of the *Abbott Laboratories* test, fitness for judicial decision, there is no longer the question of what burdens either the Executive Law or the City will place on Liberty. The question is what will happen in the administrative proceeding. One possibility is that, now that Congress and the President have declared that non-common systems should not be covered by the Cable Act, the proceeding might be withdrawn. At the other extreme, the proceeding might continue and could result in the imposition of penalties against Liberty, as Liberty admittedly was in violation of the Cable Act for years before February 8, 1996.

More importantly, as to the second prong of the *Abbott Laboratories* test, hardship to the parties, the alleged hardship to Liberty has entirely disappeared, as Liberty now is free to operate its existing non-common systems without fear of sanctions from the NYSCCT and to construct new non-common systems. There is thus absolutely no countervailing consideration to the substantial hardship that would be imposed on NYSCCT by judicial interference with its ongoing proceeding concerning Liberty's operation without a franchise before the effective date of the Act (*see supra* page 15).

Because the ripeness analysis in this case now is entirely different, there is no reason for this Court to review the ripeness analysis undertaken by the Courts below and the petition should be denied for this reason. *See Ticor Title Insurance Co. v. Brown*, ___ US ___, 114 S Ct 1359, 1362 (1994) (writ dismissed where, *inter alia*, not clear that resolution of issue would make any difference even to parties).

B. In Any Event, There Was No Prior Restraint Here

Even if the Act had never been enacted, the petition still would be of no merit. There was no prior restraint of speech here. A prior restraint is an order "'*forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 113 S Ct 2766, 2771 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech section 4.08 at 4-14 [1984]). Here, without a franchise, Liberty could have sent its cable television signal to the exact same people, in the exact same place, at the exact same time; the only difference was that for Liberty to avoid the franchise requirement the signal had to travel between buildings, on the way to Liberty's subscribers, by microwave rather than wire. Liberty utterly failed to prove

that it could not send a microwave signal to any willing listener. To the contrary, it said on at least two occasions that if non-common systems were subject to the franchise requirement it would simply use microwave exclusively (*supra* pages 7, 9).

This makes plain that the franchise requirement, in this context, was a time, place and manner restriction, specifically a manner restriction, and not a prior restraint. *See generally Ward v. Rock Against Racism*, 491 US 781, 791 (1989); *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F2d 767, 772-74 (2d Cir, 1984). In fact, although Liberty never argued that if the franchise requirement were a time, place or manner restriction, it is an invalid time, place or manner restriction, we note that the fact that the speech can take place elsewhere is a factor weighing in favor of the validity of a time, place or manner restriction. *E.g., Gannett Satellite Information Network v. Metropolitan Transportation Authority*, *supra*, 745 F2d at 774.

Liberty recognizes that the two cases it puts forward as most similar to the present case are in fact so dissimilar that they must be hidden in a footnote (Petition at 13 n.14). In *Organization for a Better Austin v. Keefe*, 402 US 415, 417 (1971), a court order enjoined the petitioners "'from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere'" in the city. In *Vance v. Universal Amusement Co.*, 445 US 308, 311 (1980), state statutes authorized state judges, on the basis of a showing that obscene films had been exhibited in the past, to prohibit future exhibitions of films not yet found obscene. The restraints in those cases were total and were completely unlike the alleged "restraint" here.

Furthermore, it is plain that Liberty's first amendment claim is no more and no less than that it would have cost it more money to "speak" by microwave than by cable (*see supra* page 7, 11-13; Petition at 9 n.11). This was the only alleged "burden" on Liberty's right to "speak." However, the first amendment protects the right to speak, not the right to speak profitably or at the lowest possible cost. *Amsat Cable v. Cablevision of Connecticut*, 6 F3d 867, 871 (2d Cir, 1993); *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, *supra*, 745 F2d at 774.

Liberty argued below, but does not press in its petition, that it allegedly was between a rock and a hard place because the standstill order prohibited it from creating new non-common systems without a franchise but the City allegedly had no procedure in place for Liberty to obtain a franchise. The Court of Appeals correctly held that in the complex area of cable television regulation, the first amendment and the due process clause do not require that franchising authorities have a franchise application on the shelf waiting for every conceivable type of applicant (*supra* page 17).

C. *Liberty Does Not Challenge The Abbott Laboratories Test*

Liberty does not ask this Court to modify the *Abbott Laboratories* test but merely quarrels with the result reached by the Court of Appeals on the facts of this case. Liberty takes the extreme position that every "enforced" administrative order is ripe for review under *Abbott Laboratories* (Petition at 20). If adopted by this Court, this view would effectively render *Abbott Laboratories* irrelevant and create chaos for every government agency that proceeds against a party that can concoct some theory under which its constitutional rights are being violated. Such parties instead can raise their

constitutional claims in the administrative proceedings and on judicial review of the final administrative action (*see supra* pages 10-11). *Cf. Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 US 619, 629 (1986) (under doctrine of *Younger v. Harris*, 401 US 37 [1971], "it is sufficient ... that constitutional claims may be raised in state-court judicial review of the administrative proceedings"); *Cecos International, Inc. v. Jorling*, 895 F2d 66, 70-71 (2d Cir, 1990) (in *Younger* context New York provisions for judicial review of administrative determinations provide adequate opportunity to litigate constitutional issues because as-applied constitutional claims may be raised in proceedings under Article 78 of Civil Practice Law and Rules and facial

constitutional challenges may be asserted by conversion of Article 78 proceeding into declaratory judgment action).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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Supreme Court, U.S.
F I L E D
FEB 16 1996

No. 95-953

In the Supreme Court of the United States

OCTOBER TERM, 1995

LIBERTY CABLE COMPANY, INC., PETITIONER

v.

CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984, 47 U.S.C. 521 *et seq.* (1988 & Supp. V 1993) (the Cable Act), requires a person operating a cable system to obtain a franchise from a local franchising authority. 47 U.S.C. 541(b)(1) (Supp. V 1993). Until it was amended on February 8, 1996, by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, the Cable Act defined the term cable system to include a facility that uses coaxial cable or wire to link two or more multi-unit buildings that are not commonly owned, controlled, or managed, even if the wire does not cross a public right-of-way. 47 U.S.C. 522(7) (Supp. V 1993). The question presented by the petition is:

Whether in this case petitioner presented a ripe First Amendment challenge to the provisions of the Cable Act that, until recently amended, required a franchise for cable systems serving non-commonly-owned, multi-unit buildings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967)	5, 10, 11, 13
Action for Children's Television v. *FCC*, 59 F.3d 1249 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 773 (1996)	15
Alexander v. *United States*, 113 S. Ct. 2766 (1993)	9, 10
Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963)	10
Beach Communications, Inc. v. *FCC*, 959 F.2d 975 (D.C. Cir. 1992), rev'd, 113 S. Ct. 2096 (1993)	4, 5, 11, 12, 14
Beach Communications v. *FCC*, 10 F.3d 811 (D.C. Cir. 1993)	5, 13
Burke v. *Barnes*, 479 U.S. 361 (1987)	8
City of Los Angeles v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986)	10, 13
Department of Justice v. *Provenzano*, 469 U.S. 14 (1984)	16
FCC v. *Beach Communications, Inc.*, 113 S. Ct. 2096 (1993)	2
Gozlon-Peretz v. *United States*, 498 U.S. 395 (1991)	7
Hall v. *Beals*, 396 U.S. 45 (1969)	8
Madsen v. *Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994)	9
Near v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931)	10

Cases—Continued: Page

New Mexicans for Bill Richardson v. *Gonzales*, 64 F.3d 1495 (10th Cir. 1995) 14
New York Times Co. v. *United States*, 403 U.S. 713 (1971) 9
Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971) 10
Turner Broadcasting Sys. v. *FCC*, 114 S. Ct. 2445 (1994) 9, 12, 13
U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994) 16
Vance v. *Universal Amusement Co.*, 445 U.S. 308 (1980) 9
Velsicol Chemical Corp. v. *United States*, 435 U.S. 942 (1978) 16

Constitution and statutes:

U.S. Const. Amend. I 4, 5, 11, 14
Cable Communications Policy Act of 1984, 47 U.S.C. 521 *et seq.* (1988 & Supp. V 1993) 2
47 U.S.C. 522(5) (Supp. V 1993) 2
47 U.S.C. 522(6)(A) (Supp. V 1993) 2
47 U.S.C. 522(7) (Supp. V 1993) 2, 3, 4
47 U.S.C. 522(7)(B) (Supp. V 1993) 3, 7
47 U.S.C. 541(b) (Supp. V 1993) 4
47 U.S.C. 541(b)(1) (Supp. V 1993) 2, 7
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 2
§ 301(a)(2), 110 Stat. 114-115 ..... 2, 3, 7
28 U.S.C. 2403(a) 4

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-953

LIBERTY CABLE COMPANY, INC., PETITIONER

v.

CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 60 F.3d 961. The opinion of the district court (Pet. App. A23-A74) is reported at 893 F. Supp. 191.

JURISDICTION

The judgment of the court of appeals (Pet. App. A21-A22) was issued on July 12, 1995. A petition for rehearing was denied on September 18, 1995. Pet. App. A20. The petition for a writ of certiorari was filed on Monday, December 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Cable Communications Policy Act of 1984, 47 U.S.C. 521 *et seq.* (1988 & Supp. V 1993) (the Cable Act), established a "national framework for regulating cable television." *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2099 (1993) (*Beach III*). The statute provides that "a cable operator may not provide cable service without a franchise," and contemplates that local governmental authorities will award such franchises. 47 U.S.C. 541(b)(1) (Supp. V 1993); see *Beach III*, 113 S. Ct. at 2099.

As pertinent here, "cable service" is "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service," and a "cable operator" provides cable service over a "cable system." 47 U.S.C. 522(5) and (6)(A) (Supp. V 1993). A cable system is "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service * * * to multiple subscribers." 47 U.S.C. 522(7) (Supp. V 1993).

Until amended on February 8, 1996, by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(a)(2), 110 Stat. 114-115, the definition of cable system excluded "a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(7)(B) (Supp. V 1993). The Court upheld the "common ownership" exemption against an equal protection challenge in *Beach III*, 113 S. Ct. at 2101-2104.

As discussed below (pp. 6-7, *infra*), the Telecommunications Act of 1996 has eliminated the

common ownership requirement contained in 47 U.S.C. 522(7)(B) (Supp. V 1993). As a result, "a facility that serves subscribers without using any public right-of-way"—irrespective of whether the subscribers are located in commonly-owned buildings—is no longer a cable system for purposes of the Cable Act's franchising and other requirements. Pub. L. No. 104-104, § 301(a)(2), 110 Stat. 114-115.

2. Petitioner provides video programming to customers in New York City. It receives satellite and broadcast television signals, which it then retransmits on microwave radio frequencies to reception antennae at multi-unit buildings throughout the area. Some of the buildings served by petitioner are not commonly owned, controlled, or managed and are linked by coaxial cable, albeit without using any public right-of-way. Pet. App. A34-A35, A104. As petitioner concedes, those "non-common" systems fell within the previous statutory definition of a cable system, 47 U.S.C. 522(7) (Supp. V 1993), and therefore required franchises. Pet. App. A105. Petitioner, however, did not obtain a franchise from the appropriate local authority, the Department of Information Technology and Telecommunications (DOITT). *Id.* at A106, A136. In 1993 and 1994, when petitioner constructed its non-common systems (see *id.* at A105), DOITT lacked a procedure for awarding franchises for the particular type of cable service offered by petitioner. *Id.* at A107. See note 3, *infra*.

3. In May 1994, Time Warner Cable of New York City and Paragon Cable Manhattan requested the New York State Commission on Cable Television (the State Commission) to investigate petitioner's non-common cable operations. The State Commission directed petitioner to show cause why it should not be

determined to be a cable system, subject to local franchising requirements, or, alternatively, why it should not be compelled to cease and desist such operations until it obtains a franchise. Pet. App. A135-A138. At petitioner's request, the State Commission held a public hearing on December 9, 1994. At the conclusion of the hearing, the State Commission orally issued a "standstill order," directing petitioner not to provide cable service to any new subscribers through "hard-wired interconnection absent common ownership, control or management." *Id.* at A151. The order, which was issued with the expectation of additional hearings, is to remain in effect until vacated by the State Commission. *Ibid.*[1]

4. The day before the State Commission hearing at which the standstill order was issued, petitioner filed a complaint in federal district court, which was later amended, seeking injunctive relief and a declaration that 47 U.S.C. 522(7) and 541(b) (1988 & Supp. V 1993)—the franchising requirements of the Cable Act — violate the First Amendment on their face and as applied to non-common cable systems such as petitioner's. Pet. App. A112-A114, A118-A119. The United States was not named as a defendant, but intervened, pursuant to 28 U.S.C. 2403(a), solely to defend the constitutionality of the statute.

The district court dismissed petitioner's First Amendment claim as not ripe. Pet. App. A41-A59. The court adhered to the reasoning of the District of Columbia Circuit in *Beach Communications, Inc.* v. *FCC*, 959 F.2d 975 (1992) (*Beach I*), which involved a

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[1] The regulatory authority of the State Commission has been transferred to the New York State Public Service Commission as of January 1, 1996. See Pet. 3 n.3.

virtually identical challenge to the Cable Act.[2] It applied the ripeness test set forth in *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967), concluding that the claim was not fit for review because petitioner had not yet applied for a franchise, and neither the State Commission nor DOITT had taken any final action with respect to petitioner's non-common cable system. Pet. App. A44.

The district court additionally concluded that, because petitioner was unable to identify "the precise nature of the burdens imposed" by the franchising scheme, the court could not determine what level of scrutiny is appropriate for petitioner's First Amendment challenge. Pet. App. A47. The record was inadequate to make that decision. *Ibid.* The district court also ruled that the record did not support a finding that "any particular hardship will befall [petitioner] if judicial decision-making is withheld for now." *Id.* at A48. The court observed that the ripeness doctrine is intended to protect agencies such as the State Commission and DOITT from judicial interference until their decisions have become final. *Id.* at A51.

The district court also held that petitioner's due process claim was not ripe, noting that, after the complaint was filed, DOITT undertook to establish franchising procedures specifically designed for the type of non-common cable system operated by peti-

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[2] After the remand in *Beach I*, the case was appealed again, 965 F.2d 1103 (D.C. Cir. 1992) (*Beach II*), and then reversed on grounds other than ripeness in *Beach III*, 113 S. Ct. 2096 (1993). Following this Court's remand, the court of appeals rendered yet another decision, 10 F.3d 811 (D.C. Cir. 1993) (*Beach IV*).

tioner. Pet. App. A59-A61.[3] The court concluded that petitioner's equal protection claim was ripe, but it denied the request for a preliminary injunction. *Id.* at A69-A70, A71-A73. The court of appeals affirmed on the basis of the district court's opinion, adding "a few additional words of clarification" on the due process issue. *Id.* at A3-A7.

ARGUMENT

The district court and court of appeals correctly held that petitioner's First Amendment challenge to the Cable Act's franchise requirement was not ripe for judicial review. That ruling does not conflict with any decision of this Court or of any court of appeals. Moreover, as a result of the Telecommunications Act of 1996, which amended the Cable Act's definition of a "cable system," petitioner is no longer subject to the Cable Act's franchise requirement. The underlying First Amendment claim and the ripeness question presented here are consequently moot. Because the decision below did not warrant this Court's review and the events giving rise to mootness did not occur until after it was rendered, the petition for a writ of certiorari should be denied.

1. On February 8, 1996, the President signed into law the Telecommunications Act of 1996. Among

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[3] On February 24, 1995, DOITT instituted a rulemaking to establish procedures for the granting of such franchises. Pet. App. A33-A34. Under the procedures adopted, franchise applicants that seek to provide non-common cable service, without using public property, were to have submitted their proposals and supporting materials by January 31, 1996. Applicants authorized to negotiate for franchises were expected to be identified by March 1, 1996. All franchise agreements offered by DOITT are subject to approval by various state and local government authorities. See Pet. 6.

other things, the new legislation amends the Cable Act's definition of the term "cable system" by eliminating the common ownership requirement that was necessary to qualify for the exemption in 47 U.S.C. 522(7)(B) (Supp. V 1993). As a result, "a facility that serves subscribers without using any public right-of-way"—whether the subscribers are located in commonly-owned, or non-commonly-owned, buildings—is not a cable system for purposes of the Cable Act's franchising and other requirements. Pub. L. No. 104-104, § 301(a)(2), 110 Stat. 114-115. The non-common system here at issue, by which petitioner provides cable service to subscribers in buildings that are not commonly owned without using any public right-of-way, falls within the newly amended exemption from the definition of cable system. Consequently, the Cable Act no longer requires petitioner to obtain a franchise for its non-common system.[4]

In the instant action, petitioner sought no damages, but only declaratory and injunctive relief, including, as pertinent to the question presented to the Court here, a ruling that 47 U.S.C. 522(7)(B) and 541(b)(1) (Supp. V 1993) violated its First Amendment rights. See Pet. App. A112-A114, A118-A120. The lower courts held that those claims were not ripe for review. *Id.* at A5, A39-A59, A74. By repealing the common ownership requirement in the exception to the definition of cable system, however, the new Telecommunications Act has effectively given petitioner

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[4] The legislation does not contain any specific effective date applicable to that provision. Accordingly, it took effect on the date of the President's signature. See *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

the relief it initially sought from the courts. Not only is its underlying First Amendment claim now moot, it necessarily follows that the ripeness question presented by the petition is moot as well. See *Burke* v. *Barnes*, 479 U.S. 361, 363-364 (1987); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969).[5]

2. Petitioner's claims would not have warranted this Court's review even in the absence of the new legislation.

a. Petitioner has erroneously characterized the State Commission's standstill order as a "prior restraint." See Pet. 12-15. The order, which petitioner agrees is interim (Pet. 21 n.16), simply preserved the status quo by prohibiting petitioner from establishing new non-common cable service or offering it to additional customers until the State Commission could complete its investigation and render a final decision, or until petitioner could receive a franchise, as it concedes (Pet. App. A105) the law required.

To be sure, the standstill order is in the form of an injunction, insofar as it directs petitioner to comply with the law and prevents certain activity subject to First Amendment protection. See *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2456 (1994)

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[5] Petitioner may contend that it still could be subject to penalties imposed by the State Commission for the period during which it unlawfully provided cable service without a franchise. See Pet. App. A111. The State Commission, however, has not imposed, or threatened to impose, such penalties; indeed, its investigative proceeding is still pending. See *id.* at A135-A138, A147-A149, A150-A152. Petitioner's potential liability for fines was therefore not an issue considered by the courts below. It is also not an issue fairly encompassed within the question presented to this Court (see Pet. i).

("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the * * * First Amendment."). As the Court noted in *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516, 2524 n.2 (1994), however, "[n]ot all injunctions which may incidentally affect expression * * * are 'prior restraints' in the sense that that term was used in *New York Times Co.* [v. *United States*, 403 U.S. 713 (1971)], or *Vance* [v. *Universal Amusement Co.*, 445 U.S. 308 (1980)]."

Here, as in *Madsen*, petitioner was "not prevented from expressing [its] message in any one of several ways," 114 S. Ct. at 2524 n.2. It was prevented only from providing unfranchised *new* cable service via a particular method—a non-common system. See also *Alexander* v. *United States*, 113 S. Ct. 2766, 2771 (1993) (order requiring forfeiture of assets acquired by violating federal obscenity laws was not prior restraint because petitioner could resume adult entertainment business with other assets).[6] Moreover, the standstill order "was not issued because of the content of [petitioner's] expression, as was the case in *New York Times Co.* and *Vance*, but because of [its] prior unlawful conduct." *Madsen*, 114 S. Ct. at 2524 n.2.

Indeed, because the standstill order merely directed petitioner to obey the law, the essence of its argument is, ineluctably, that the Cable Act's franchise requirement itself amounts to a prior restraint. Yet

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[6] Thus, the order did not prevent petitioner from creating additional "stand alone" systems by placing a microwave reception antenna atop each non-commonly owned building, so as to provide a form of cable service not subject to the Cable Act's former franchise requirement. See Pet. App. A104-A105.

none of the cases cited by petitioner supports the sweeping conclusion that a broadly applicable, content-neutral regulatory franchising requirement is a prior restraint. See, *e.g.*, *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) (vacating permanent injunction against distribution of leaflets); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (invalidating court order that permanently enjoined newspaper from publishing future "malicious, scandalous and defamatory" articles). Compare *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986) (holding that franchising of cable television implicates First Amendment interests, without any suggestion that franchise requirement itself is a prior restraint). Petitioner has thus "stretche[d] the term 'prior restraint' well beyond the limits established by [the Court's] cases." *Alexander*, 113 S. Ct. at 2771.

In any event, petitioner's attempt to characterize this case as involving a prior restraint is for naught. Even if it were correct to characterize this case in that way, petitioner is wrong in suggesting that any case involving a prior restraint is presumptively ripe for review. Pet. 13. None of the decisions cited by petitioner stands for that proposition, nor do they even address the issue of ripeness. See, *e.g.*, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

b. The question of ripeness is controlled instead by this Court's decision in *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967). The Court's decision in that case identified two factors that should be considered in determining whether a controversy is ripe for adjudication—"the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Only one

other court of appeals, the District of Columbia Circuit, has addressed the ripeness of a First Amendment challenge to the Cable Act's franchise requirement. That court also applied the *Abbott Labs.* criteria and held that the claim was not ripe. See *Beach Communications, Inc.* v. *FCC*, 959 F.2d 975 (D.C. Cir. 1992) (*Beach I*).

In *Beach I*, companies like petitioner, which use satellite transmission and offer cable service to separately-owned, multi-unit buildings that are connected by wire without using public rights-of-way, sought judicial review of the Federal Communications Commission's (FCC's) "Cable Definition Rule." The rule made clear that systems like petitioner's were subject to the Cable Act, including its franchise requirement. 959 F.2d at 979-980. Like petitioner here, Beach and other cable companies argued, *inter alia*, that requiring them to obtain local franchises violated their First Amendment rights. The District of Columbia Circuit, however, declined to decide that issue. Noting that the statute gives local authorities "broad discretion to determine the substance and process of franchising," and that the burdens associated with various franchise regimes could vary widely—thus altering the standard of scrutiny—the court concluded that the First Amendment challenge was unfit for review. *Id.* at 983-984. The *Beach I* court also concluded that the cable companies' hardship as a consequence of deferred court review was "not so substantial as to require immediate decision" and thus the case was not ripe. *Id.* at 985.

As the district court stated in this case, "the *Beach I* Court's analysis is exactly on point." Pet. App. A44. The precise burdens to be imposed on a non-common system franchisee remained to be determined by

DOITT.[7] The district court correctly explained that "[m]any of the burdens are permissive rather than mandatory * * *, are graduated according to the number of channels delivered by the cable operator * * * or set limits that benefit prospective cable operators." *Id.* at A45-A46. Without knowing "what the ultimate mix of burdens might be[,] * * * it cannot be said what the appropriate level of scrutiny might be with which to evaluate [petitioner's] First Amendment challenge." *Id.* at A46-A47. *Beach I* reached precisely the same conclusion. See 959 F.2d at 984. See also *Turner*, 114 S. Ct. at 2456 ("not every interference with speech triggers the same degree of scrutiny under the First Amendment").

In short, factual development of the record would be needed before any informed judgment could be made concerning whether a franchise requirement for non-common cable systems would survive First Amendment scrutiny. The lower courts correctly found that issue presently unfit for judicial review. The district court's conclusion on that score, Pet. App. A47, is fully consistent with not only *Beach I*, but also this Court's reluctance to resolve other First Amendment challenges to cable television regulation without an adequately developed factual record. See *Turner*, 114 S. Ct. at 2470-2472 (remanding for further fact-finding

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[7] Relying on the affidavit of its president and a 1993 resolution of New York City, petitioner claims that the burdens associated with a cable franchise are already known. Pet. 9 & n.11, 23; see Pet. App. A139-A146, A159, A163-A164. Petitioner's assertions, however, are fundamentally speculative. At the time of the lower courts' consideration of petitioner's suit, DOITT had not decided whether the requirements it applies to other types of cable franchises would be applied to non-common systems as well.

on issues critical to resolution of First Amendment challenge to "must-carry" provision of cable statute); *Preferred Communications*, 476 U.S. at 494 (more thoroughly developed record necessary before Court could determine whether local cable franchising restrictions violated First Amendment).

With respect to the hardship criterion of *Abbott Labs.*, the district court found the record similarly lacking in facts showing "that any particular hardship will befall [petitioner] if judicial decision-making is withheld for now." Pet. App. A48. The court emphasized that, as in *Beach I*, 959 F.2d at 985, the costs and other burdens associated with franchising could not be ascertained yet, and no assumptions could be made as to how the local authorities would exercise their regulatory duties. Pet. App. A48.[8] While the court found little evidence of any hardship to petitioner, it found that the State Commission and DOITT would suffer "a substantial hardship" as a consequence of judicial interference with their ongoing proceedings. *Id.* at A53. See *Abbott Labs.*, 387 U.S. at 148 (a fundamental purpose of ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way"). Given the unfitness of the issue for review and the balance of the hardships, the district court properly decided, and the court of appeals agreed, that petitioner's First Amendment challenge to the Cable

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[8] The court also pointed out that, since June 1993, when the Court rendered its decision in *Beach III*, petitioner knew that the Cable Act's franchise requirement (prior to the 1996 amendment) applied to non-common systems that do not depend on the use of public rights-of-way. Pet. App. A52-A53.

Act's franchising requirement was not ripe for review.

Petitioner seeks to distinguish *Beach I* on the ground that it involved "a purely facial challenge" to the FCC's definition of cable system, whereas petitioner here challenges "enforcement" action. Pet. 20, 23. That purported difference, however, is overstated. As we have explained, the State Commission's standstill order in this case did nothing more than preserve the status quo pending completion of administrative proceedings and direct petitioner to comply with the law that, as petitioner concedes, then applied to its cable service. Petitioner was thus effectively in the same posture as the cable companies in *Beach I*, who then operated, or had concrete plans to operate, cable service like that here at issue. See 959 F.2d at 980 & n.6. At bottom, the same First Amendment challenge to the Cable Act's franchise requirement for non-common systems was before both the District of Columbia Circuit and the courts in this case. That claim was correctly found to be unripe, primarily because the burdens associated with franchising could not yet be ascertained in either case.

c. Finally, petitioner erroneously contends that the decision in this case departs from the ripeness analysis undertaken by other circuits. For instance, in *New Mexicans for Bill Richardson* v. *Gonzales*, 64 F.3d 1495 (10th Cir. 1995), the court held that a First Amendment challenge to a state restriction on the use of federal campaign contributions was ripe. The court reached that decision because it was persuaded by "[t]he facts presented" that the plaintiff faced "a direct and immediate dilemma with respect to [the] exercise of his First Amendment liberties." *Id.* at

1500. Furthermore, he had a reasonable fear of criminal prosecution for violating the statute. *Id.* at 1502. There is no comparable evidence in the instant case.

Petitioner's reliance on *Action for Children's Television* v. *FCC*, 59 F.3d 1249 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 773 (1996) (*ACT*), is also misplaced.[9] At issue in *ACT* was a First Amendment challenge to the FCC's scheme for imposing forfeitures for the broadcast of indecent material. The court concluded that the claim of a broadcaster, who had already been subject to a forfeiture, was ripe. The court noted that "[t]here [was] no dispute about the working of the procedures being challenged and there [was] therefore little or nothing more that the agency could do in a particular adjudication that would likely inform the court's decision on the [First Amendment] question." *Id.* at 1258. Here, in sharp contrast, the franchising procedures were not yet developed, and, thus, the extent to which they might impede the exercise of protected speech could not be ascertained by the courts below.[10]

3. For the reasons stated in point 1, *supra*, this case has been rendered moot by events ocurring after the court of appeals rendered its decision. For the reasons stated in point 2, *supra*, review of that decision by this Court would not have been warranted even if the case had not become moot. Accordingly,

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[9] The petition (at 16) refers to that case as "*South Fork Broadcasting Corp.*"

[10] The fact that the court's ripeness analysis in *ACT* does not cite its own decision in *Beach I* also indicates that there is no tension between those cases or between *ACT* and the decision at issue here.

this Court should deny the petition for a writ of certiorari. Compare *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (denying certiorari in case that became moot after court of appeals rendered judgment) with *Department of Justice* v. *Provenzano*, 469 U.S. 14 (1984) (vacating and remanding, where statute enacted after certiorari was granted mooted the question presented). See Br. in Opp. in *Velsicol*, *supra*, at 4-11 (discussing why denial of certiorari is the appropriate disposition). Cf. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 390-393 (1994) (explaining that vacatur is an extraordinary equitable remedy and is not justified where case becomes moot due to settlement).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-953

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IN THE
Supreme Court of the United States
October Term, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

v.

CITY OF NEW YORK, RALPH A. BALZANO, COMMISSIONER OF DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, AND JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN

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10 pp

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	1
ARGUMENT	3
CONCLUSION	5

STATEMENT PURSUANT TO RULE 29.6

Time Warner Cable of New York City is a division of Time Warner Cable, an unincorporated division of Time Warner Entertainment Company, L.P. ("Time Warner Entertainment"). Each of the following general partners of Time Warner Entertainment is a wholly owned subsidiary of Time Warner Inc., a publicly traded Delaware corporation:

American Television and Communications Corporation
Time Warner Operations Inc.
Warner Cable Communications Inc.
Warner Communications Inc.

The limited partners of Time Warner Entertainment are:

U S West Multimedia Communications, Inc., a subsidiary of U S West, Inc.
Time Warner Inc.
TW/TAE, Inc., a wholly-owned subsidiary of Time Warner Inc.

The following are non-wholly owned subsidiaries of Time Warner Entertainment:

The Bountiful Company Limited (U.K.)
Century Venture Corporation
Comedy Partners, L.P.
CV of Viera Joint Venture (partnership)
Dagmar Teatret I/S (Denmark) (partnership)
DC Comics (partnership)
Erie Telecommunications, Inc.
Geffen Pictures (partnership)
HBO Asia Holdings, L.P. (partnership)
HBO Pacific Partners, C.V. (Neth. Antiles)
Kabelkom Holding Co. (partnership)
Kabelkom Management Co. (partnership)
Kansas City Cable Partners
Movie World Enterprises Partnership (Australia)
Queens Inner Unity Cable System

Quincy Jones Entertainment Company L.P. (partnership)
Sari Lodge Pty. Limited (Australia)
Scala Biografome I/S (Denmark) (partnership)
Sea World Enterprises Partnership (Australia)
Time Warner Cable of New Zealand Holdings Ltd. (New Zealand)
Time Warner Entertainment German GmbH and Co. OHG (Germany)
Time Warner Germany Holding GmbH (Germany)
Turner/HBO Ltd. Purpose Joint Venture (partnership)
Warner Bros. Movie World GmbH & Co. KG (Germany)
Warner-Lusomundo Sociedade Iberica de Cinemas Lda. (Portugal)
Warner & Metronome Films A/S (Denmark)
Warner Mycal Corporation (Japan)

The following are non-wholly owned subsidiaries of the general partners of Time Warner Entertainment:

American Lawyer Media, L.P. (partnership)
The Columbia House Company (partnership)
The Columbia House Company (Canada) (partnership)
Public Cable Company (partnership)

Paragon Cable Manhattan is a division of Paragon Communications, a Colorado general partnership. All of the partners in Paragon Communications are indirectly owned by Time Warner Inc.

TABLE OF AUTHORITIES

Cases	Page(s)
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	4
Beach Communications, Inc. v. FCC, 10 F.3d 811 (D.C. Cir. 1993)	1
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993)	1, 3
Massachusetts v. Oakes, 491 U.S. 576 (1989)	4

Statutes	
47 U.S.C. § 522(7)(B) (1995)	1, 3, 4
N.Y. Exec. Law Art. 28 § 812(2) (1995)	3
Telecommunications Act of 1996, Public Law 104-104	1, 3, 4

INTRODUCTION

Respondents Time Warner Cable of New York City ("TWCNYC") and Paragon Cable Manhattan ("Paragon") submit this brief in opposition to the petition for writ of *certiorari* filed by Liberty Cable Company, Inc. ("Liberty"). Further review of this case would be inappropriate because the case has been mooted by passage of the Telecommunications Act of 1996, Public Law 104-104, which was signed into law on February 8, 1996 and took effect upon enactment.

STATEMENT OF THE CASE

Under both federal and New York law, cable systems are required to obtain franchises from local franchising authorities before commencing operations. Until last week, federal law provided that the term "cable system" "does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way". 47 U.S.C. § 522(7)(B) (1995). In 1993, this Court rejected a constitutional challenge (on equal protection grounds) to the federal definition of "cable system", reversing the Court of Appeals for the D.C. Circuit and holding that the government's ability to regulate cable systems does not turn on the use of public rights-of-way. *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). The Court remanded the case to the Court of Appeals for consideration of the First Amendment claims, which the Court of Appeals dismissed as meritless. *Beach Communications, Inc. v. FCC*, 10 F.3d 811 (D.C. Cir. 1993).

In 1994, Liberty was caught operating an illegal cable system like those involved in the *Beach* case, *i.e.*, Liberty was interconnecting by wire buildings that were not under common ownership, control or management, even though it had not applied for—much less obtained—a cable franchise as required by federal and state law. Liberty's

interconnections allegedly do not use public rights-of-way. Liberty, once caught, repeatedly asked the New York State Commission on Cable Television ("Commission") to delay its enforcement proceedings for at least six months, so that Liberty would have time to ask the City of New York for a cable franchise; in return, Liberty voluntarily promised that it would not expand its illegal operations while waiting for its franchise application to be processed.

Instead of deferring its proceedings as Liberty had requested, the Commission issued a "standstill order" that prohibited Liberty from connecting new buildings in violation of federal and state law, but permitted Liberty to continue its existing illegal operations until the Commission took final action, which is precisely what Liberty had volunteered to do. Later, the Commission deferred taking final action until the City had acted upon Liberty's request for a franchise.

The Commission's order did not prohibit Liberty from engaging in speech. Indeed, Liberty, which advertises itself as a SMATV (satellite master antenna television) operator, principally provides video programming to subscribers by the use of microwave transmission to rooftop antennae. That mode of operation, because it did not fall within the definition of "cable system", was not regulated and was in no way affected by the standstill order. Liberty remained free to place microwave receivers and transmitters on appropriate buildings and deliver speech in that manner instead of running wires between non-commonly owned buildings. In fact, many of the buildings illegally served by Liberty were ones for which Liberty had sought and obtained FCC 18GHz microwave licenses authorizing the installation of transmission and/or reception dishes.

Although Liberty could have raised its constitutional claims before the Commission, and could have appealed the Commission's decision through the New York state courts, it chose not to do so. Instead, Liberty filed this action in the

United States District Court for the Southern District of New York, challenging the federal—but not the New York (*see* N.Y. Exec. Law Art. 28 § 812(2))—definition of "cable system" (contained in 47 U.S.C. § 522(7)) on First Amendment, due process and equal protection grounds.

Notably, Liberty did not challenge as unconstitutional any of the substantive requirements imposed by federal or state law upon cable systems (*e.g.*, the "must-carry" requirements, the public, educational and governmental channel requirements, the civil defense system requirements). Instead, Liberty's challenge was purely to the definition of "cable system" contained in 47 U.S.C. § 522(7); Liberty's argument was that because Liberty did not use public rights-of-way, it could not be regulated by the federal or state governments. The district court denied Liberty's application for a preliminary injunction, finding that Liberty was not likely to succeed on the merits. In particular, the district court held that Liberty's equal protection claims were meritless in light of this Court's decision in *Beach*, that Liberty's due process and First Amendment claims were unripe because Liberty had not chosen to challenge any of the mandatory obligations placed on cable operators by federal or state law, and that the burdens that might be imposed by a franchise were too amorphous to permit challenge to the federal definition of "cable system" at that time. The Court of Appeals affirmed.

ARGUMENT

The petition for *certiorari* is now moot. On February 8, 1996, the Telecommunications Act of 1996, Public Law 104-104, was enacted into law, effective immediately. The Act amended the definition of "cable system" so that the interconnection of buildings under disparate ownership, control or management without using public rights of way no longer falls within the definition of "cable system". The Act amended § 522(7) so that "a facility that serves subscribers without using any public right-of-way" is now excluded from

the definition of "cable system", even if that facility interconnects separately owned or operated buildings. Public Law 104-104, Sec. 301(a)(2). Thus, Liberty's formerly illegal cable systems are no longer defined as cable systems under federal law. Consequently, this action—which is a challenge to the repealed definition contained in § 522(7)—is now moot. *See, e.g., Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989).

In telephone conversations following Congress's passage of the Act, Mr. Constantine, counsel for Liberty, agreed that passage of the Act would moot the petition for *certiorari* if the PUC[1] decided that it would not impose fines or forfeitures based upon Liberty's violations of the repealed law. However, Mr. Constantine stated that he would pursue his petition unless the PUC informed him that it had abandoned any claim for penalties or forfeitures.

Even were the PUC ultimately to impose penalties or forfeitures, however, this Court should nevertheless deny the petition for *certiorari*. The mere possibility that, at some future time, the PUC might impose penalties or forfeitures does not transform this case into one ripe for adjudication, much less worthy of review by *certiorari*. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). If the PUC levies penalties or forfeitures, Liberty can obtain full review of that decision through the New York state courts and may apply to this Court for review if it chooses. Moreover, whether the state of New York may assess a civil penalty on Liberty for wilfully and blatantly violating a law that has since been effectively repealed is hardly an issue worthy of review by *certiorari*.

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[1] Effective January 1, 1996, the Commission was dissolved by state law, and its functions were transferred to the Public Utilities Commission of New York State ("PUC").

Congress repealed the very provision on which Liberty's claim was based and replaced it with one that excludes Liberty's interconnection of buildings under disparate ownership, control or management from the definition of "cable system". Thus, there is nothing left of Liberty's lawsuit, and no reason whatsoever to grant *certiorari*.

CONCLUSION

For the reasons stated herein, respondents TWCNYC and Paragon respectfully suggest that the petition for *certiorari* be dismissed as moot or denied.

February 16, 1996

Respectfully submitted,

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No. 95-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

– vs. –

CITY OF NEW YORK, RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY, and PARAGON CABLE MANHATTAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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6 pp.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
CONCLUSION	3

TABLE OF AUTHORITIES

Cases:	**Page**
Alabama v. Davis, 446 U.S. 903, 100 S. Ct. 1827 (1980)	3
Powell v. McCormick, 395 U.S. 486, 89 S.Ct. 1944 (1969)	3
U.S. v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104 (1950)	3
Statutes and Other Authorities:	
13A Wright, Alan W., Hiller, Arthur R., Cooper, Edward H., Federal Practice and Procedures, § 3533.10 (2d. Ed. 1984)	3
28 U.S.C. § 2201	3
28 U.S.C. § 2202	3
N.Y. Exec. Law 827-a(1)	2

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The argument offered by all respondents in opposition to the Petition for a Writ of Certiorari -- that the Petition has been rendered moot by both the Telecommunications Act of 1996 and the Public Service Commission's ("PSC") prospective withdrawal of the challenged Standstill Order -- is misleading for two reasons.

First, both the statutory amendment and the withdrawal of the Standstill Order by the PSC have prospective effect only. The PSC, successor to the New York State Commission on Cable Television, issued an Order on February 15, 1996 (the "February 1996 Order") -- one day before the respondents' briefs in opposition to the petition for certiorari were due -- which vacated the Standstill Order. While Liberty is no longer enjoined from exercising its First Amendment rights to serve non-common systems by use of hardwire connections, the validity of the Standstill Order still presents a live controversy.

As the PSC concedes at 2 of its Opposition, the PSC has pending before it the question of the "lawfulness" of Liberty's operations before February 8, 1996. The February 1996 Order explicitly reserves the question of the statutory penalties to impose on Liberty for any violations of the Standstill Order. *See*, February 1996 Order attached as an exhibit to the Opposition of the Public Service Commission of the State of New York, at 2. These statutory penalties are staggering.[1] Because the issue of the remedy to impose on Liberty for its exercise of First Amendment rights is still very much alive, the question presented in the Petition retains its vitality with respect to the pending PSC enforcement proceeding. The Petition should be granted because the lower court opinions improperly held to be un-ripe an action seeking to enjoin the continuing enforcement by a state agency of a prior restraint on First Amendment speech.

Second, Petitioner, as respondents acknowledge, seeks declaratory relief in this action. Again, because the statutory amendment and the PSC's lifting of the Standstill Order have impact only prospectively, and because the PSC seeks to impose penalties for pre-amendment violations of the Standstill Order, the declaration sought has not been rendered moot. A declaration that enforcement of the Standstill Order would violate Petitioner's First Amendment rights satisfies the case

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[1] The PSC may impose a penalty of up to $1,000 a day on a cable operator for each and every violation of its order. N.Y. Exec. Law 827-a(1).

or controversy requirement of the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, as much today as it did before the Standstill Order was withdrawn. *See Powell v. McCormack*, 395 U.S. 486, 495, 89 S.Ct. 1944, 1950 (1969).

Finally, if the Court accepts the arguments of respondents and determines that the case has been rendered moot, then the appropriate response, pursuant to *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104 (1950), would be summarily to grant certiorari, to vacate the judgments below and to remand with a direction to dismiss. *See, Alabama v. Davis*, 446 U.S. 903, 904, 100 S.Ct. 1827, 1828 (1980) (Stevens, J. *dissenting*); 13A Wright, Alan W., Miller, Arthur R., Cooper, Edward H., *Federal Practice and Procedure*, § 3533.10 (2d Ed. 1984) at 434.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit.

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